IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 9130. Interlocutory Order, Aug. 6, 1981

ORDER

The Administrative Law Judge, pursuant to Section 3.23(b) of the Rules of Practice, has certified to the Commission complaint counsel's application for review of the ALJ's prehearing order of March 2, 1981, directing them to "exclude resort" to special reports under Section 6(b) of the FTC Act. The ALJ, in authorizing the appeal, stated that his ruling "involves in part Section 6 issues which lie without the Part 3 Rules of the Commission."

I. BACKGROUND

The adjudication in this case began on August 10, 1979, when the Commission issued a complaint charging that the proposed acquisition by respondent Exxon Corporation ("Exxon" or "respondent") of Reliance Electric Company would violate Section 7 of the Clayton Act, as well as Section 5 of the FTC Act. The Commission entered an order on that date directing that the case be tried on an expedited basis. On October 26, 1979, the United States District Court for the District of Columbia entered a hold-separate order pending the administrative proceeding. The first prehearing conference was held before the ALJ on October 24, 1979, and several conferences were subsequently held to map out a proper route for discovery.

During a prehearing conference on February 27, 1981, the ALJ requested counsel to describe the progress of their respective discovery efforts. This review led to a discussion of complaint counsel's plan to use Section 6(b) as a means of discovery. The ALJ then stated his intent to disallow the use of Section 6(b) and on March 2, 1981, he issued a pretrial order directing complaint counsel "to proceed forthwith by way of Part 3 discovery rules and exclude the Section 6 method."

In his March 18, 1981, order authorizing complaint counsel to file an application for review pursuant to Rule 3.23(b), the ALJ justified his decision to preclude the use of Section 6(b) as a means of discovery on two grounds: (1) the injection of Section 6 issues into the proceeding might result in needless and undue delay, in contravention of the Commission's order dated August 10, 1979; and (2) complaint counsel's use of Section 6(b), "a device not available to respondents, would be fundamentally unfair."

Complaint counsel, on appeal, assert, among other things, that pretrial discovery under Section 6(b) is lawful and that it is the only satisfactory and workable method of discovery for this particular case. In this connection, they claim that their proposed Section 6(b) questionnaire is designed to gather information related to (1) the identification of economically significant markets and submarkets; (2) the determination of universe and individual firm market share data within those markets and submarkets; and (3) the identification and description of barriers to entry into those markets and submarkets or to "significant" competition by "minor" firms already in those markets or submarkets. They also assert that *subpoenas duces tecum* would be an inadequate substitute for 6(b)'s because, *inter alia,* the returns would include highly technical engineering documents, the interpretation of which would be "time-consuming, in some instances impossible, and, because it would require technical consultants, extremely expensive given projected budget constraints"; their draft questionnaire "covers the breadth of a company's involvement in the relevant market [and] *** [c]omplaint counsel would be required to spend untold hours studying the company and the interrelationships between its sets of records in order to determine the answers to the survey questions"; and responsive documents may not be available.

Complaint counsel also assert that the ALJ had no authority to deny the use of Section 6(b) reports because "only the Commission has the power to issue orders for special reports under Section 6(b) of the FTC Act; the Commission has not delegated that authority to the Administrative Law Judges." Finally, they argue that the judge "clearly abused" his discretion by providing, at the prehearing conference, inadequate reasons for his decision, and that he failed to afford them an adequate opportunity to be heard on the validity of their request.

Like the ALJ, respondent contends that unfairness would result if complaint counsel were allowed to use a method of discovery unavailable to respondent. Moreover, respondent maintains that the use of Section 6(b) reports would (1) impose an undue burden on third parties because they would be subjected to overlapping and multiple demands and (2) result in delays in the proceedings because of likely resistance by third parties. Finally, respondent argues that the use of Section 6(b) would be improper because it is not provided as a discovery device in Part 3 of the Commission's Rules of Practice.

II. COMPLAINT COUNSEL'S APPLICATION FOR REVIEW

Interlocutory appeals are generally disfavored because they may interfere with the orderly and expeditious conduct of the adjudicative process. In particular, applications for interlocutory review of discovery rulings will rarely be granted because such review could undermine the responsibility that our administrative law judges have to manage carefully the discovery process. *Bristol-Myers Co.,* 90 F.T.C. 273 (1977). We reaffirmed this principle recently in adopting revisions to our discovery rules. 43 FR 56862 (1978). Today we again reaffirm the crucial responsibility of the law judges to keep a firm hand and careful eye on the discovery process toward fair and expeditious conduct of the adjudicatory process.

Complaint counsel's application, however, raises issues that go beyond the proper exercise of an ALJ's discretion in ruling upon discovery requests; it also presents the questions of whether Section 6(b) should be available as a discovery device in adjudicatory proceedings and, if so, how the exercise of Section 6(b) authority should be used. Because of the importance of this issue not only for this matter, but for discovery requests in future cases, we grant complaint counsel's application for review and confine our review to these two questions.

III. THE USE OF SECTION 6(B) IN ADJUDICATIVE PROCEEDINGS

Over the past 25 years, the Commission has issued Section 6(b) special reports in several adjudicatory proceedings, *e.g., Campbell Taggart Associated Bakeries, Inc.,* 71 F.T.C. 509, 521-22 (1967); *Scott Paper Co.,* 63 F.T.C. 2240, 2243 (1963); *Crown Zellerbach Corp.,* 51 F.T.C. 1105 (1955); see *In re Subpoena Duces Tecum Addressed to Atlantic Richfield Co.,* File No. 741-0019, at 36 n.45 ("ARCO Statement"), and has allowed the parties to use evidence compiled through the use of Section 6(b) orders issued prior to the initiation of adjudicatory proceedings, *e.g., Jim Walter Corp.,* 90 F.T.C. 671, 700 (1977), *vacated and remanded on other grounds,* 625 F.2d 676 (5th Cir. 1980); *Dean Foods Co.,* 70 F.T.C. 1146, 1267 n.73 (1966). Although these opinions did not discuss the general question of the propriety of issuing Section 6(b) orders during the course of an adjudication, decisions by the Commission to issue pretrial Section 6(b) orders necessarily reflected a judgment that Section 6(b) can be an appropriate tool of discovery. We are not persuaded that their use should be abandoned where a party can make a real showing of need.

Respondent has not challenged the Commission's statutory authority to issue special report orders for the purpose of pretrial

discovery and we are satisfied that Sections 6(a), 6(b), and 6(g) of the FTC Act authorize their use. The Supreme Court, in rejecting a claim that Section 6(b) could not be used in aid of a Section 5 proceeding (in that case, a compliance proceeding), stated that it found "nothing that would deny its use for any purpose within the duties of the Commission, including a Section 5 proceeding. A construction of such an Act that would allow information to be obtained for only a part of a Commission's functions and would require the Commission to pursue the rest of its duties as if the information did not exist would be unusual, to say the least." *United States* v. *Morton Salt Co.,* 338 U.S. 632, 649–50 (1950).

Respondent does argue, however, that the Commission's own Rules of Practice preclude the issuance of Section 6(b) orders during the course of an adjudicative proceeding.

Section 6(b) orders to file special reports are not expressly included among the discovery devices described in the Commission's rules governing adjudicatory matters. Nevertheless, the Commission has stated that "[t]he discovery rules do not provide the exclusive means by which parties may obtain information, and are not intended to limit such ability as a party otherwise may have to obtain information through voluntary means or that may otherwise be available" to it. 43 FR 56862 (1978). In an earlier statement concerning an investigatory subpoena, the Commission indicated that its existing discovery rules do not limit complaint counsel's access to information properly obtained by the Commission for other purposes and, citing adjudicative cases in which Section 6(b) orders had issued, stated that "the Part 3 discovery rules do not provide the exclusive means by which the Commission's powers of compulsory process may be invoked in aid of a pending adjudicative proceeding." ARCO Statement at 36.

Likewise, two decisions, which preceded the promulgation of the new discovery rules, have held that the administrative law judges are empowered by Rule 3.42(c) to employ discovery procedures which are not specifically authorized by the Rules of Practice. In *Exxon Corp.,* 90 F.T.C. 450, 452 (1977), the Commission held that ALJ's are authorized to impose "production procedures designed to assure orderly compliance with subpoenas," even though such procedures were not mentioned in the Rules of Practice. See also *Century 21 Commodore Plaza, Inc.,* 89 F.T.C. 108 (1977) (authorizing issuance of access order). The Commission in *Exxon,* however, stated that

> [d]iscovery should ordinarily be by the methods described in the Rules of Practice. Only where necessary to the conduct of "fair and impartial hearings * * * [and] to avoid delay in the disposition of proceedings," Rule 3.42(c), may the law judges resort

to discovery methods not explicitly sanctioned by the Rules. Moreover, the Administrative Law Judges may not depart from the specific requirements of applicable rules and any orders they issue must, of course, be authorized by the F.T.C. Act. [90 F.T.C. at 453.]

We therefore see no reason why the rules should be construed to preclude the issuance of Section 6(b) orders in adjudications and to require that adjudications be conducted "as if the information did not exist * * * ." *Morton Salt, supra,* 338 U.S. at 649-50.[1] Nonetheless, we believe the Commission, in adopting the current discovery rules, contemplated that the devices specifically authorized would be adequate to meet the needs of the typical case and we see no reason to depart from our holding in *Exxon* that "[d]iscovery should ordinarily be by the methods described in the Rules of Practice" and that other discovery procedures should be used "[o]nly where necessary to the conduct of 'fair and impartial hearings * * * and to avoid delay * * * .'"[2]

Respondent also asserts that resort to the Commission's Section 6(b) authority during an adjudication would "strip" the ALJ's of their authority to control discovery, and thus run counter to the Commission's conclusion that the "complexity of many Commission proceedings and the potential for delay inherent in discovery require careful supervision by the Administrative Law Judge at every stage of the proceedings." 43 FR 56863 (1978).

Although we are not prepared to construe Section 3.42(c) of the Rules of Practice, see p. 5, *supra,* to authorize the administrative law judges to issue Section 6(b) orders, we do not intend to permit ourselves to interfere with the ALJ's ability to maintain proper control of the pretrial proceedings. Thus, when a party files a petition for issuance of a special report order, we would hope that the ALJ's will accompany their certifications of these motions to the

[1] Respondent argues that Rule 2.12(a) provides that the Commission's Section 6 report powers may be used only for purposes of conducting investigations, not adjudications. That rule states in part:

> In investigations other than those covered by Section 20 * * * the Commission may issue an order * * * to file a report or answers in writing to specific questions * * * .

We do not understand this language, in Part 2 of the Rules, to do anything more than describe the Commission's powers to issue Section 6(b) orders in its nonadjudicative proceedings. An inference cannot permissibly be drawn that a Part 2 rule would purport to describe all the purposes for which a statutory procedure might be used to collect information.

[2] "Necessary" should not be understood to suggest some standard of absolute need, that without a special report order, a party could not possibly prove its case or rebut evidence offered by its opponent. A discovery procedure may fairly be said to be "necessary to the conduct of fair and impartial hearings and to avoid delay in the disposition of proceedings" if, taking account of such relevant considerations as costs (both to the subject of the proposed discovery and to the discovering party), the speed with which discovery might be completed, and the likelihood that the proposed discovery would produce accurate, useable information, it clearly appears that the procedure is substantially superior to any of the discovery techniques specifically authorized by the rules. In the case of Section 6(b) orders, we expect that such a showing could be made only in the extraordinary case.

Commission with a recommendation whether an adequate case has been made for this remedy.[3] In view of the responsibility of the ALJ's to maintain control of pretrial proceedings and the especially broad discretion they have in deciding matters of discovery, the Commission intends to attach great weight to these recommendations.[4]

Finally, respondent has argued that "[n]either party in * * * adjudicatory proceedings should be entitled to utilize compulsory discovery devices unavailable to the other, and yet that is exactly what complaint counsel propose to do." The ALJ, in recommending that we deny complaint counsel's appeal, contended that "[c]omplaint counsel's proposed resort to a Section 6 survey, a device not available to respondents, for complaint counsel's discovery needs and for reasons of alleged inadequacies of Part 3 discovery devices for the purposes of this case, is fundamentally unfair." However, although it would not be unfair in any particular case to allow only one party—the party that was able to make the required showing of need—to use a Section 6(b) order as a discovery device, we believe that special report orders may issue at the request of *any* party[5] who can make the difficult showing that such an order is necessary to its preparation for trial.[6]

IV. CONCLUSION

The ALJ has already ruled that the discovery procedures expressly authorized by the Part 3 rules are adequate for purposes of this case. If complaint counsel choose to file a motion for the issuance of a Section 6(b) order, the Commission, in acting on the motion, will

[3] The ALJ's are required by Section 3.22(a) of the Rules of Practice to certify to the Commission any motions upon which they lack authority to rule together with any recommendations they believe it appropriate to make as to the appropriate disposition of such motions.

[4] In this case, the ALJ properly stayed further discovery pending the Commission's disposition of complaint counsel's appeal. However, proceedings need not normally be stayed pending the Commission's disposition of a motion or an interlocutory appeal, see Rules of Practice, Section 3.23(b), and we expect that there would be few cases in which a stay pending Commission action on a motion for a Section 6(b) order would be warranted. Where the ALJ recommended that a Section 6(b) not issue, in view of the deference the Commission will accord this recommendation, the judge might reasonably require the parties to proceed with their pretrial discovery even if the discovery covered much the same ground as the requested Section 6(b) order. Nevertheless, where the ALJ has recommended that a Section 6(b) order issue, a stay of any discovery that was contingent on the Commission's decision to override the judge's recommendation, and not permit discovery by means of Section 6(b), might well be warranted.

[5] In the unusual case where a party can show that Section 6(b) orders are needed, it may be that all parties can make an adequate showing of need. In such cases, we would hope that, with the ALJ's encouragement, the parties could agree on a single special report form. We will be unwilling to burden third parties with multiple report forms each designed to meet the discovery needs of a different party.

[6] Respondent has argued that the use of Section 6(b) would result in delay because of likely resistance by third parties. However, we are unprepared on this basis to foreclose its use where a party has made a strong showing of need.

accord great deference to the ALJ's assessment of the need for complaint counsel's proposed order.

It is so ordered.

IN THE MATTER OF

INTERNATIONAL HARVESTER COMPANY

Docket 9147. Interlocutory Order, Aug. 12, 1981

ORDER GRANTING MOTIONS FOR LEAVE TO SUBMIT ADDITIONAL EVIDENCE ON THE ISSUE OF PUBLIC INTEREST

By motions dated July 14 and 15, 1981, complaint counsel have asked the Commission to receive and consider new evidence of fuel fires involving respondent International Harvester's (IH) gas-powered tractors. In its opposing memorandum, IH also provides additional evidence of recent fuel fires involving these tractors.

The "Gary Killingbeck" incident and other alleged fuel fires recounted for the first time by complaint counsel and IH possibly raise questions both about the appropriate scope of relief in this case and the adequacy of IH's past disclosure of alleged safety hazards to affected tractor owners. Thus, this evidence may be relevant to the public interest question certified to the Commission by Judge Mathias. IH does not deny that this evidence may be relevant to the public interest question. Instead, it claims the evidence of the Killingbeck fire is tainted by the way in which it was collected by complaint counsel and thus should not be considered by the Commission. In the absence of a trial record, the Commission will not attempt to evaluate IH's allegations, or determine the ultimate weight that should be accorded the new evidence of fuel fires in any findings of fact. However, the existence of such evidence, and the dispute between the parties over its significance, may be relevant to an assessment of the need for further litigation concerning the sufficiency of IH's notification efforts and the appropriateness of prospective relief.

Accordingly, *it is ordered,* That complaint counsel's motion and supplemental motion for leave to submit additional evidence on the issue of public interest are hereby granted.

IN THE MATTER OF

GROLIER, INCORPORATED, ET AL.

Docket 8879. Interlocutory Order, Aug. 13, 1981

ORDER DENYING MOTION TO DISQUALIFY JUDGE VON BRAND

This matter is before us once again on Respondent's Motion for Disqualification and Removal of the Administrative Law Judge ("Renewed Motion"). Grolier was given the opportunity to raise this issue a second time when the United States Court of Appeals for the Ninth Circuit remanded the case because it believed that there was an erroneous "flat refusal" by the Commission to disclose to Grolier anything at all about Administrative Law Judge von Brand's prior participation in the Grolier case while he served as an attorney-advisor to former Commissioner MacIntyre. *Grolier, Inc.* v. *FTC,* 615 F.2d 1215, 1222 (9th Cir. 1980).

The Commission denied Grolier's discovery request when it held that, as a matter of law, attorney-advisors were not engaged in investigating or prosecuting matters so as to bring them within the proscription of Section 554(d) of the Administrative Procedure Act ("APA"), 5 U.S.C. 554(d). See *Grolier, Inc.,* 87 F.T.C. 179, 181 (1976). The Ninth Circuit held however that Section 554(d) precluded attorney-advisors to the Commissioners "from [subsequently] participating in the adjudication of cases [as administrative law judges] in which they have actually performed * * * ['investigative and prosecuting'] functions, and in 'factually related cases,'" and stated that "[o]nce an attorney-advisor is shown to have been 'engaged in the performance of investigative or prosecuting functions,' through prior acquaintance with *ex parte* information, 554(d) says he 'may not * * * participate or advise in the decision * * * .'" *Id.,* 615 F.2d 1221. The Ninth Circuit therefore held that Judge von Brand's "actual involvement" with "information received outside of the controlled adjudicative setting" (615 F.2d 1220, 1221) was the critical determination to be made on disqualification. The court remanded the case for us to reconsider the denial of discovery and thereafter the disqualification motion.

Since the case was remanded, Grolier has made extensive submissions, mostly consisting of documents from the Commission's files, which it had prior to the Ninth Circuit's decision. Despite directions to Grolier to state the impact these documents might have on the disqualification issue,[1] Grolier has presented only a recast version of

[1] Order Reopening Proceeding and Directing Submission of Further Information, September 12, 1980.

an argument previously rejected by both the Commission and the court of appeals. Although advanced at length, the argument is simply that because Judge von Brand served as an attorney-advisor he is presumed to have a close relationship with his Commissioner and further presumed to be aware of everything circulated among the Commissioners[2] and, because the Commission considered several matters involving Grolier while he was an attorney-advisor, Judge von Brand must be presumed to have been exposed to information outside of the controlled adjudicative setting and, hence, disqualified. See Renewed Motion. Grolier also argues that, although the Commission has searched its files thoroughly and repeatedly for relevant material, Grolier is entitled to further discovery because it is still unable to connect Judge von Brand with any prior Grolier matter. We shall address these issues after a brief review of the history of this matter to put Grolier's present arguments in perspective.

History of the Disqualification Motion

Judge von Brand served as an attorney-advisor to Commissioner MacIntyre from 1963 to 1970. The Commission issued its complaint against Grolier on March 8, 1972.[3] Hearings on the complaint extended from 1973 to 1976 and were conducted before two Administrative Law Judges.[4] Judge von Brand's prior role at the Commission was related in a Commission press release announcing his appointment as a judge on March 18, 1975, and reported in the Antitrust and Trade Regulation Reporter on March 25, 1975 (706 ATRR 32, 33) (R. 3301–02). The first prehearing conference before Judge von Brand was held on March 19, 1975. *Id.* Judge von Brand reheard much of the testimony at Grolier's insistence (R. 1804–29, 1967–81). Almost a year later, just five days before the end of hearings before Judge von Brand, Grolier's president testified that Commissioner MacIntyre may have met with him in 1966 or that he may have met Commissioner MacIntyre.[5] Judge von Brand immedi-

[2] The argument has apparently escalated because now Grolier would charge Judge von Brand with knowledge of every document possessed by the staff even though there is no indication it was previously seen by the Commissioners. *E.g.*, Renewed Motion, 7, 8; Johns Affidavit, Exhibits D-F, I; Righthand Affidavit, Exhibits I and M; see footnotes 12 and 13, *infra*.

[3] The original record revealed, in affidavit form, the undisputed fact that the recommendation to issue a complaint, based on the results of the staff's investigation, was not forwarded to the Commission until *after* Judge von Brand left Commissioner MacIntyre's office. R. 4663–64. Exhibit BB to the Righthand Affidavit indicates that the Commission was advised that the investigation was progressing while Judge von Brand was an attorney-advisor. Nothing in the record or in Commission practice indicates that the Commission knew the substance of the information Grolier provided at that time to the investigatory staff.

[4] The first judge assigned to hear the case retired after a year of hearings had been held (R. 1793).

[5] The actual testimony was: "I only recall having met Mr. MacIntyre and I don't remember, or I think, I am quite sure at one of the earlier discussions with the Chairman he was there, but it was a very informal discussion just trying to say who I was and where I hoped to be able to take the company in the following 20 years." (Tr. 16115).

ately disclosed that he had worked for Commissioner MacIntyre but stated that he had no recollection of any events involving Grolier.

Armed with this bit of testimony Grolier filed a motion to disqualify Judge von Brand along with a discovery request for all documents relating to Grolier which were before the Commission during the period from 1963 to 1971. Judge von Brand entered a statement in the record pointing out that his former position had been a matter of public (and published) record since he presided over the case; that he had no recollection of working on Grolier matters; that he had asked a former secretary to search Commissioner MacIntyre's former suite of offices for any records relating to Grolier; that no such records were located nor were there any logs that would show who worked on any particular matter, and that he has searched his own files and could find nothing related to Grolier in them. Statement of Administrative Law Judge Concerning Motion for Disqualification, January 30, 1976. On February 10, 1976, the Commission declined to disqualify Judge von Brand and denied discovery. *Grolier, Inc.*, 87 F.T.C. 179 (1976).

On April 30, 1976, Grolier replicated its discovery motion for documents in a Freedom of Information Act ("FOIA") request. On May 17, 1976, the Secretary of the Commission granted the request in part and denied it in part. Grolier appealed this determination to the Commission. On June 28, 1976, the Commission granted Grolier access to most of the documents but withheld, in whole or in part, 41 documents. Submission of Documents in Response to the Commission's Order of September 12, 1980 ("Submission"), Exhibit A, paras. 26–29; Exhibit C. On August 20, 1976, Grolier filed a lawsuit under FOIA to obtain the 41 documents withheld. *Grolier, Inc.* v. *FTC,* Civil Action No. 76–1559 (D.D.C.). On November 1, 1976, an affidavit and an index of the 41 documents withheld were filed by the Commission. Submission, Exhibits B and C. On May 6, 1977, the Commission responded to interrogatories propounded by Grolier about the nature of the Commission's search for documents and about how Commission records are maintained. Submission, Exhibit D. On July 22, 1977, the district court ordered an additional search for documents which was conducted with negative results. Submission, Exhibit E. On March 10, 1978, the district court granted summary judgment for the Commission, holding that the documents withheld were exempt from production under FOIA. Submission, Exhibit F. Grolier appealed. Then, because the District of Columbia Circuit had changed its interpretation of the status of Commission "blue minutes,"[6] the

[6] *Bristol-Myers Co.* v. *FTC,* 194 U.S. App. D.C. 285, 598 F.2d 18 (1978).

Commission sought a remand. On remand the Commission, on March 13, 1979, voluntarily released 11 of the 14 blue minutes in their entirety. Minor deletions were made in the three remaining minutes. Submission, Exhibit G. The district court subsequently ordered the release of all the blue minutes. Submission, Exhibit H. Grolier again appealed.[7]

Meanwhile, in the adjudicative proceeding, Judge von Brand issued his initial decision on October 12, 1976. *Grolier, Inc.*, 91 F.T.C. 331 (1978). Grolier appealed this decision to the Commission which issued a Final Order and Opinion on March 13, 1978. *Grolier, Inc.*, 91 F.T.C. 476 (1978). Grolier did not attempt to use the documents it obtained in June 1976, or the Index describing the withheld documents it obtained in November 1976, when it made its disqualification and discovery arguments to the Commission and the court of appeals.

On remand from the Ninth Circuit Judge von Brand has executed an affidavit reaffirming that he has no recollection of working on Grolier matters as an attorney-advisor. In view of the time period involved and the volume of documents that passed through Commissioner MacIntyre's office, he cannot positively say he never saw a circulation relating to Grolier. Judge von Brand also relates conversations he had with a former secretary to Commissioner MacIntyre and the Commissioner himself and states that both recall that another attorney-advisor, Mr. Powers (now deceased), worked on Grolier matters. Judge von Brand also describes searches he made for records that might show his involvement with Grolier matters. First, he searched his personal files and found nothing related to Grolier. Second, he had another former secretary search Commissioner MacIntyre's former suite of offices for Grolier related documents or anything that would show which attorney-advisor worked on Grolier matters. The results were negative. Finally, he directed the Secretary of the Commission to search the Grolier files for anything that would show whether he had prepared documents related to Grolier. Again, nothing was found. Affidavit of Theodor P. von Brand.

Commissioner MacIntyre has also filed an affidavit stating that he compartmentalized work assignments in his office. He assigned investigational matters to Mr. Powers and, after his departure, to Mr. Volhard. Motions were assigned to Mr. Michaels and adjudicatory matters were assigned to Judge von Brand. To the best of his recollection, Commissioner MacIntyre did not discuss matters relat-

[7] The appeal was dismissed after the Commission released all the documents in this proceeding. See Order, March 10, 1981.

ing to Grolier with Judge von Brand and he was not aware that Judge von Brand had contact with any Grolier matters as an attorney-advisor. Finally, Commissioner MacIntyre states that all his official files remained in his office when he left the Commission, that the personal files he removed have since been destroyed and that he has no documents related to Grolier now. Affidavit of Everette MacIntyre.

Finally, although none of the 28 documents withheld in the FOIA case shed any light on Judge von Brand's involvement with Grolier matters, we provided them to Grolier as a matter of discretion. Order, March 10, 1981.

Further Discovery Is Unnecessary

Grolier again contends it is entitled to discovery beyond its original request for documents and that if this discovery is denied an adverse inference must be drawn against Complaint Counsel. Renewed Motion, 18–27. No further discovery is necessary. Our March 10, 1981, Order in essence granted Grolier's original request for documents but rejected additional requests Grolier made.[8] We are satisfied, both independently and in light of the court of appeals decision, that there is sufficient information available in the record to make an accurate determination under Section 554(d) of the Administrative Procedure Act (5 U.S.C. 554(d)) that there is no basis to disqualify Judge von Brand.

The affidavits of the two principals, Commissioner MacIntyre and Judge von Brand, demonstrate that neither recalls discussing any Grolier matters with the other. Furthermore, both state that Judge von Brand handled only adjudicatory matters for Commissioner MacIntyre. More importantly, our files have been searched several times for any document that Judge von Brand might have seen, and a district court has approved the adequacy of some of those searches. Grolier has been given every document relating to Grolier that circulated among the Commissioners while Judge von Brand served as an attorney-advisor as well as many documents that were not. Not a single document connects Judge von Brand with a single Grolier circulation.

Grolier has substantially more information than was available in other cases where courts have upheld an agency decision to deny discovery on the possible disqualification of a decisionmaker. For example, in *San Francisco Mining Exch.* v. *SEC,* 378 F.2d 162, 168,

[8] Grolier sought ten categories of documents and to depose Commissioner MacIntyre, Judge von Brand and three other individuals formerly employed in Commissioner MacIntyre's office.

170–71 (9th Cir. 1967), the party urging disqualification contended that additional discovery had been improperly denied because it appeared that the agency had authorized the commencement of adjudication in 1962 based on a staff letter and that some decisionmakers had earlier served on the prosecuting staff of the agency (as late as July 15, 1960). The Ninth Circuit rejected the contention. It held that even if a decisionmaker had participated in investigating or prosecuting earlier proceedings, that fact would not be enough to justify additional discovery, especially because the earlier proceedings were alluded to in the opinion and thus were either in the administrative record or would have been known through official notice. The court also held that, absent a factual showing of some ground to believe that an improper commingling of functions did occur, further discovery was not appropriate. It was not enough to allege, as Grolier does here, that the decisionmaker "might have" participated in an earlier investigation or adjudication. *Id.* 378 F.2d at 170. See also, *Au Yi Lau* v. *I.N.S.,* 558 F.2d 1036, 1042–43 (D.C. Cir. 1977) (affidavit by decisionmaker previously employed as prosecutor that he had "no knowledge of or familiarity with" the case in that capacity held sufficient to defeat a motion to disqualify); *Adolph Coors Co.* v. *FTC,* 497 F.2d 1178 (10th Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975) (affidavit by attorney-advisor that he had not participated in decision held sufficient); *R.A. Holman and Co.* v. *SEC,* 377 F.2d 655, *cert. denied,* 389 U.S. 991 (1967) (discovery and disqualification properly denied where decisionmaker's affidavit stated that he had not "acquired substantial knowledge of the facts in issue," even though he had been a prosecutor when the investigation began).

Thus, it is clear to us that, under established judicial precedents, the fact that Grolier can find no indication of Judge von Brand's participation in earlier matters related to it does not mean that it is entitled to still further discovery, rather it means simply that there is no basis for disqualifying Judge von Brand. See *Grolier, Inc.* v. *FTC, supra,* 615 F.2d at 1221.

Grolier also argues that because we have refused to allow further discovery, an adverse inference should be drawn. Renewed Motion, 22–27. Complaint Counsel has responded by asserting that an adverse inference should not be drawn where, as here, a proper assertion of privilege is made to withhold documents. Answer to Respondent's Motion for Disqualification of the Administrative Law Judge, 3–4. Although Complaint Counsel is correct, there are other reasons not to draw an adverse inference against Complaint Counsel.

First, the adverse inference rule applies to the parties, not the deciding tribunal. Complaint Counsel is not withholding any infor-

mation from Grolier. Indeed, the very case Grolier relies upon in urging that the inference be drawn, *International Union (UAW)* v. *NLRB,* 459 F.2d 1329, 1338 (D.C. Cir. 1972), holds that the inference dissipates if, as here, a decisionmaker sanctions the withholding of evidence. Second, even if an inference adverse to Complaint Counsel could have been drawn from our earlier refusal to grant discovery, it was eliminated when we provided Grolier with every document it originally sought. Finally, Grolier's argument stands the inference in its head. The Supreme Court has held that an adverse inference arises when a party provides weak evidence but refuses to produce strong evidence in its control. See, *e.g., Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 226 (1939). Here we have given Grolier the strong evidence (every document that exists and proof that no other records exist) but it seeks to obtain weak evidence (the testimony of those who have sworn they cannot recall any involvement by Judge von Brand with Grolier matters).

In any event, if we were to infer anything from the fact that Grolier's review of all the documents before the Commission fails to establish a single connection between Judge von Brand and Grolier matters, it would be to infer not that evidence of a nexus between the two must exist, but that none exists.

There Is No Basis To Disqualify Judge von Brand

Despite the tremendous volume of paper that accompanies Grolier's motion, its substantive argument for disqualification covers barely a page (Renewed Motion, 27–28) and can be summarized in a sentence. Basically, the argument is that because several matters involving Grolier were before the Commission while Judge von Brand served as attorney-advisor, it must be assumed that he saw them and that he should therefore be disqualified. With such an uncritical treatment of the issue, we could safely reject the motion by relying on the court of appeals statement that "Where [there is] * * * no evidence of actual involvement in Grolier matters by then attorney-advisor von Brand, the normal course of action would be to refuse to disqualify him." *Grolier, Inc.* v. *FTC, supra,* 615 F.2d at 1221. But to finally resolve any doubts on the issue, we shall discuss Grolier's specific contentions.

Grolier argues that because Judge von Brand's 1976 statement referred to the fact that he worked on adjudicative and "informal

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matters" there is circumstantial evidence he was exposed to anything it characterizes as an informal matter.[9] See Renewed Motion, 5, 7, 14, 16, 17, 18, 27. We reject this argument for several reasons.

First, as Complaint Counsel points out (Answer, 1-3) this argument is the same *per se* argument, advanced under another name, that the court of appeals squarely rejected. See, *Grolier, Inc., supra,* 615 F.2d at 1221.[10] Like the Ninth Circuit, we hold that "[f]or the purposes of disqualification [attorney-advisors] are not chargeable with involvement in all cases that were before the agency during their advisorship." 615 F.2d at 1221.

Second, we note that none of the attachments to the Furth Affidavit would serve as a basis for disqualification because the Ninth Circuit held that one of Congress' concerns in enacting Section 554(d) was to prevent the "possible use in the decisional process of information received outside of the controlled adjudicative setting * * * ." 615 F.2d at 1220. All the documents appended to the Furth Affidavit were introduced as evidence in the controlled adjudicative setting (introduced mainly by Grolier) and therefore there is no danger that Judge von Brand improperly used these documents in arriving at a decision.[11] See *San Francisco Mining Exch.* v. *SEC, supra,* 378 F.2d at 169.

Third, it is undisputed that none of the documents Grolier submitted involve the prosecution of this case. The recommendation to issue a complaint was not forwarded to the Commission until after Judge von Brand ceased to serve as an attorney-advisor.[12] Affidavit of Edward Steinman. Very few of the documents Grolier has filed even concern the formal investigation of this case and none of them contain facts or information not adduced at the hearing that could have been interpolated by Judge von Brand.[13] See *Final Report of*

[9] Grolier argues that an earlier consent order and assurance of voluntary compliance must be considered informal matters that Judge von Brand must have seen. While these procedures are informal methods of ending investigations, both arise under Part 2 of our Rules of Practice, 16 C.F.R.2.1 *et seq.* governing "Nonadjudicative Procedures". As such, they would normally be handled by an attorney-advisor connected with an investigation, not adjudicatory matters.

In any event, Grolier's speculation about what Judge von Brand meant in 1976 when he said he worked on "informal matters" as well as adjudicative matters is insufficient to create a factual issue, particularly in light of the affidavits of Judge von Brand and Commissioner MacIntyre.

[10] Grolier now places sole reliance on the 1976 statement and matters that were in the record before the court of appeals. We note that Grolier challenged the verity of this statement when it was before the court of appeals and it should not be allowed to rely upon it now for the first time. See Petitioners' Reply Brief, No. 78-2159 (9th Cir.) at 25-26 n.12. We ordered Grolier to address the issue of timeliness (Order, September 12, 1980 at 3), but it chose not to do so. We, therefore, hold this aspect of the matter is untimely.

[11] In any event, the Supreme Court has made clear that due process is not violated by the mere fact that a decisionmaker has knowledge of investigative facts. *Withrow* v. *Larkin, supra,* 421 U.S. at 55.

[12] One document in the record (Johns Aff., Exh. W.) is dated after the staff recommended that the complaint issue, but that matter was not before the Commission until after Judge von Brand left his position as attorney-advisor and therefore has no bearing on the issue.

[13] The Commission's investigation leading to this adjudication began on February 22, 1970, with a staff memorandum (Righthand Aff. Exh. AA) requesting the issuance of an investigational resolution and of an Order to

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the Attorney General's Committee on Administrative Procedure, 56 (1941); *Grolier, Inc.* v. *FTC, supra,* 615 F.2d at 1219–20. See also *San Francisco Mining Exch.* v. *SEC, supra,* 378 F.2d at 168, 170–71.

Fourth, all the other documents Grolier has referred to concern other matters involving Grolier.[14] Our Order reopening this proceeding directed Grolier to comment on whether any of the documents it submitted fell within the legal definition of "factually related case" as that term is used in the Administrative Procedure Act. 5 U.S.C. 554(d). Grolier chose not to address this issue, apparently relying on the assumption that any time the same party was before the agency a factually related case is involved. The assumption does not withstand analysis.[15] The matters before the Commission while Judge von Brand was an attorney-advisor resulted in a consent order, an assurance of voluntary compliance ("AVC") and compliance reports that followed them. Renewed Motion, 7–13. Under the Commission's present (and former) Rules, both a consent order and an AVC brought to an end the matter under investigation and required the submission of compliance reports. Neither the consent order (concerning the pre-1964 debt collection practices of Grolier) nor the AVC (concerning the pre-1967 home solicitation and recruiting practices of Grolier) could have formed, or did form, the basis of the complaint in this matter which, by and large, depended on post-1969 evidence. See *Grolier, Inc., supra,* 91 F.T.C. at 437 and n.99. That a respondent may have recidivist tendencies does not make the earlier proceedings "factually related" cases.[16] This interpretation is confirmed by the Attorney

File a Special Report. That memorandum recounted public facts about prior matters involving Grolier, stated that the information on hand was outdated and discussed what information each question in the Special Report was designed to elicit. The Commission authorized both (Johns Aff., Exh. S); (Righthand Aff., Exhs. R and S). No other documents were before the Commission during the formal investigation and therefore could not have been before Judge von Brand. Grolier's Response to the Special Report (Furth Aff., Exh. T), in addition to being presented in the controlled adjudicative setting, clearly went to the staff and not to the Commission (See Johns. Aff., Exh. BB). In April and July 1970, representatives of the Attorney General of Texas and Maryland, respectively, were to examine our files (Johns Aff., Exhs. U and V). On November 7, 1970, staff submitted a progress report to the Commission indicating that it had: received a response to the Special Report; requested and received a supplemental submission; conducted interviews and proposed a questionnaire; and it expected to transmit a proposed complaint in 45 days. There is no allusion to the substance of any of these matters (Righthand Aff. Exh. BB).

[14] Several of the documents submitted by Grolier duplicate each other. Compare Righthand Aff., Exhs. L, M, N and P with Johns Aff., Exhs. J, N, O and P. Several documents are memoranda to the file which were prepared and retained by the Commission's staff and therefore were not available to the Commission (or Judge von Brand). Righthand Aff., Exhs. I and M; Johns Aff., Exhs. D, E, F, B and I. Many of the documents contain no substantive facts or information regarding Grolier but only reflect assignments of a matter (to a Commissioner or to staff) or other procedural matters. Righthand Aff., Exhs. D, F, G, H, K, Q, R, S, T, U, V, X and Z; Johns Aff., Exhs. G, H, K, Q, R, S, T, U, V and W.

[15] The Court of Appeals for the District of Columbia recently stated that "it would be a mistake to assume automatically" that Section 554(d) prevents any *ex parte* communication between the Commission and its staff simply because adjudication arose at one point. *RSR Corp.* v. *FTC,* 656 F.2d 718 (D.C. Cir. No. 80-2131, April 30, 1981) (slip op. at 10–11). See also *EDF* v. *EPA,* 510 F.2d 1292, 1305 (D.C. Cir. 1975); *Alaska S.S. Co.* v. *FMC,* 356 F.2d 56, 61 (9th Cir. 1966).

[16] We note that even in judicial disqualification cases involving criminal matters there is no prohibition

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General's Manual on the Administrative Procedure Act, 54, n.6 (1947)[17] which discusses how the term is to be construed. It states:

> The limitation of the prohibition against consultation to those who perform investigative or prosecuting functions "in that or a factually related case," should be construed literally.
>
> * * * * * * *
>
> The phrase "factually related case" connotes a situation in which a party is faced with two different proceedings arising out of the same or a connected set of facts. For example, a particular investigation may result in the institution of a cease and desist proceeding against a party as well as a proceeding involving the revocation of his license. The employees of the agency engaged in the investigation or prosecution of such a cease and desist proceeding would be precluded [from assisting in the decision in both proceedings] ***. However, they would not be prevented from assisting the agency in the decision of other cases (in which they had not engaged as either investigators or prosecutors) merely because the facts of these other cases may form a pattern similar to those they had theretofore investigated or prosecuted.

This interpretation also conforms with the Ninth Circuit's holding that the evils to be avoided by Section 554(d) are both the likelihood that former investigators or prosecutors will interpolate facts not in the record and that because they are likely to have developed a "will to win," they cannot resolve the issues objectively. 615 F.2d at 1120.[18]

Finally we are not convinced, as Grolier apparently is, that the mere existence of *ex parte* communications, assuming any took place here with respect to facts at issue in this case, necessarily leads to Judge von Brand's disqualification. Normally under the APA when an *ex parte* communication occurs the remedy is not to disqualify the decisionmaker but to place the communication "on the record" and to give the party not privy to it an opportunity to comment. See *Hercules, Inc.* v. *EPA,* 598 F.2d 91, 123 (D.C. Cir. 1978); *United States Lines, Inc.* v. *FMC,* 584 F.2d 519, 542–43 (D.C. Cir. 1978); *Home Box*

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against an individual prosecuting another for one offense and subsequently sitting as a judge in a case involving the same offender. *See, e.g., Gravenmier* v. *United States,* 469 F.2d 66, 67 (9th Cir. 1972); *United States* v. *Winston,* 613 F.2d 221 (9th Cir. 1980). Because we conclude that the earlier matters involved here are not factually related, it is not necessary for us to decide whether they are "cases".

[17] The Manual is based on a review of the legislative history of the Administrative Procedure Act. Courts give it deference because of the role of the Department of Justice in drafting the APA. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 524 n.19 (1978).

[18] In *San Francisco Mining Exch.* v. *SEC, supra,* 378 F.2d at 170–71 n.9, the Ninth Circuit quoted the *R.A. Holman* opinion in rejecting an argument that discovery was mandated by the fact that the decisionmaker had previously prosecuted the same parties. The court held that to disqualify a decisionmaker based on his former status "would be tantamount to disqualifying from participation in a SEC adjudicatory proceeding, all personnel from the Divisions of Corporation Finance and Trading and Exchanges without regard to the extent of their connection with the proceeding in its investigatory stages, and would tend to prevent the appointment to the Commission of persons who have had previous experience with its work." In this case, if Grolier's Renewed Motion were granted it would have a similar effect, but with even less basis.

Office, Inc. v. *FCC,* 567 F.2d 9, 58–59 (D.C. Cir.); *cert. denied,* 434 U.S. 829 (1977).

If Judge von Brand had received *ex parte* communications in this case while serving as Judge, under our rules he would not be disqualified, but rather required to place the communications on the record and Grolier would have an opportunity to comment. See 16 CFR 4.7. Likewise, if the Commission had considered some matter *dehors* the record our decision would not be automatically void for the Ninth Circuit has held that: "to constitute fatal error it must appear that an administrative agency's journey outside the record worked substantial prejudice." *Marathon Oil Co.* v. *EPA,* 564 F.2d 1253, 1265 (9th Cir. 1977). Under these circumstances it would indeed be anomalous to automatically disqualify Judge von Brand simply because he had been exposed to some *ex parte* communication in his earlier status as an attorney-advisor. Here Grolier has all the *ex parte* communications and we specifically directed Grolier to comment on any that indicated he received factual "information * * * outside of the controlled adjudicative setting" that could have been interpolated. Order, September 12, 1980. Despite its voluminous submissions Grolier has not pointed to any specific facts or information that could have been interpolated. We conclude therefore, that even if we were to assume that Judge von Brand saw all the documents the error would be harmless. See 5 U.S.C. 706.

Conclusion

Our records have been thoroughly searched and Grolier has been given access to all matters that came before the Commission during the time that Judge von Brand served as an attorney-advisor. Grolier has presented no evidence that he was *actually* involved with any Grolier matters. Under the Ninth Circuit's opinion, there is, therefore, no basis on which to disqualify Judge von Brand. 615 F.2d at 1221. Neither has Grolier been hindered in its efforts to secure evidence. The Ninth Circuit urged us to consider giving Grolier documents if Grolier could point to inadequacies or inconsistencies in the affidavits before us. While the Commission did not believe any such defects existed, Grolier was given the documents as a matter of discretion. Even if we were required to assume Judge von Brand was initially familiar with every document (and the Ninth Circuit held that we were not required to do so) disqualification would not follow. None of the documents involve the prosecution of this case or even the decision to issue a complaint. Those few that were created during the time the staff was conducting the formal investigation do not

discuss or refer to the substance of the investigation. A large number of the earlier documents do not contain any facts or information that could have been interpolated. Moreover, the bulk of the documents were presented to Judge von Brand in the controlled adjudicative setting and therefore, even if he had seen these items earlier, no improper interpolation could exist. The few remaining documents concern earlier, completed, proceedings against Grolier. Under a proper interpretation of "a factually related case" as it is used in Section 554(d) of the APA, exposure to those earlier proceedings is not disqualifying. In short, Grolier has not presented a scintilla of evidence to support its argument that Judge von Brand should be disqualified. We therefore deny the motion to disqualify Judge von Brand.

This ruling disposes of all matters we were required to consider by the Ninth Circuit's remand of the case and we might simply reaffirm our earlier Final Order. However since the Final Order issued the Commission has modified the Final Order in another encyclopedia case, *Encyclopaedia Britannica,* Docket No. 8908. We therefore invite the parties to address the issues of whether similar modifications to the Final Order are appropriate in this case and, if so, whether they should be made now or, as in *Britannica,* await appellate review of the Final Order.

Therefore, *it is ordered,* That Grolier's renewed motion to disqualify Judge von Brand is denied, and

It is further ordered, That Grolier state, within 14 days of this Order, whether it believes a modification of the Final Order is appropriate, the reasons therefor, and when it should be modified, and

It is further ordered, That Complaint Counsel thereafter respond to Grolier's submission within 14 days.

IN THE MATTER OF

BORDEN, INCORPORATED

FTC File No. 1-23281. Interlocutory Order, Sept. 1, 1981

ORDER REOPENING PROCEEDING AND MODIFYING STIPULATION

Respondent having requested reconsideration of stipulation no. 8260, executed by the Realemon-Puritan Company on March 3, 1952, and accepted by the Federal Trade Commission on April 1, 1952 [48 F.T.C. 1660];

Accordingly, *it is ordered* that the matter is reopened and that the stipulation herein is modified to read:

BORDEN, INC., the successor to the Realemon-Puritan Co., the amended name of a corporation organized under the laws of the State of Illinois as Puritan Co. of America, with its principal place of business in Chicago, Illinois, engaged in the business of offering for sale and selling in commerce a lemon-juice product unsweetened, and made by reconstituting lemon juice concentrate, designated on its label Realemon Brand Reconstituted Lemon Juice, or Realemon Brand Lemon Juice from Concentrate, entered into an agreement in connection with the offering for sale, sale and distribution of that product, that it will cease and desist in its advertising of such product from:

(1) Designating its reconstituted lemon juice or lemon juice from concentrate as "Realemon" without stating conspicuously and prominently that said product is reconstituted or from concentrate;

(2) Using the terms "Realemon Brand Lemon Juice", "lemon juice", or any similar term in describing its reconstituted lemon juice or lemon juice from concentrate without using conspicuously and prominently the term "reconstituted" or "from concentrate" as an adjacent modifying descriptive word or words;

(3) Representing that its reconstituted lemon juice or lemon juice from concentrate is the juice of tree ripened lemons.

IN THE MATTER OF

THE BRITISH PETROLEUM COMPANY LIMITED, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3074. Complaint, Sept. 3, 1981—Decision, Sept. 3, 1981

This consent order requires, among other things, a London, England petroleum corporation and its American subsidiary to timely divest, in accordance with the terms of the order, all stock issued by Amax, Inc., the leading domestic producer of molybdenum. The order also bars respondent's officers and employees, for a period of ten years, from simultaneously serving in a similar role in any other molybdenum company. Further, for specified time periods, the companies are prohibited from acquiring any part of the stock, or more than 50% of the assets of any molybdenum company without prior Commission approval; and restricted from entering into any joint venture for the production and sale of molybdenum in the United States.

Appearances

For the Commission: *Elizabeth R. Rindskopf, Daniel S. Koch, Rendell A. Davis, Jr., Richard L. Sippel, Lee Goldman, Peter A. Sklarew, Robert H. Glidden,* and *Steven B. Feirman.*

For the respondent: *Robert E. Liedquist, Squire, Sanders & Dempsey,* Washington, D.C., for The Standard Oil Company, and *Stuart W. Thayer* and *James H. Carter, Sullivan & Cromwell,* New York City, for The British Petroleum Company Limited.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have undertaken an acquisition of Kennecott Corporation ("Kennecott") that, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that said undertaking therefore constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(b), stating its charge as follows:

I. THE BRITISH PETROLEUM COMPANY LIMITED

1. Respondent The British Petroleum Company Limited ("BP") is a corporation organized under the laws of England with its principal offices at London, England.

2. BP is a diversified company with over 900 subsidiaries and associated companies in 70 countries ("BP Group"). BP owns a 53% interest in The Standard Oil Company ("Sohio"), through which it plans to acquire Kennecott. BP owns 6.8% of the stock of AMAX Inc. ("Amax"). BP owns all of the stock of Selection Trust Limited. John Peter Du Cane, the chief executive officer of Selection Trust Limited, currently serves on the board of directors of Amax.

3. BP's principal business consists of the production and sale of petroleum products, chemicals, minerals, coal, and animal feed. In 1979, petroleum accounted for over 91% of BP's net sales.

4. In 1979, the BP Group had consolidated revenues of $50.4 billion and consolidated net income of $3.6 billion. BP is reported to be the sixth largest corporation in the world.

II. THE STANDARD OIL COMPANY

5. Respondent Sohio is a corporation organized under the laws of Ohio with its principal offices at Cleveland, Ohio.

6. Sohio is a diversified oil company with interests in coal, uranium, chemicals and plastics.

7. Sohio is a 53%-owned subsidiary of BP.

III. KENNECOTT CORPORATION

8. Kennecott is a corporation organized under the laws of New York with its principal offices at Stamford, Connecticut.

9. Kennecott is the leading domestic copper producer and is engaged in copper fabrication. It is the third ranking firm in molybdenum production, with 5.6% in 1980. Its other primary lines of business include abrasives, lead, gold, titanium, silver, iron powder, and chemicals.

10. In 1979, Kennecott had sales of $2.4 billion, assets of $2.8 billion, and income of $130 million. It ranked 143 in the 1980 Fortune 500.

IV. AMAX INC.

11. Amax is a corporation organized under the laws of New York with its principal offices at Greenwich, Connecticut.

12. Amax is engaged in a wide variety of mining and related activities. It is the leading domestic producer of molybdenum, with 67.79% of domestic production. Amax is also a major producer and refiner of metals including copper, nickel, lead, tungsten, zinc, and iron. It is also the third largest domestic coal producer and is a leading independent producer of oil and natural gas.

13. In 1980, Amax had sales of $2.95 billion, assets of $5.28 billion, and income of $470 million. It ranked 131 in sales and 45 in assets among the Fortune 500.

V. JURISDICTION

14. At all times relevant herein, BP, Sohio, Kennecott, and Amax have been engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

VI. THE ACQUISITION

15. On March 12, 1981, Sohio announced its agreement to acquire Kennecott. In this manner, Kennecott will become a subsidiary of BP. According to the merger agreement, Sohio will pay $62 cash per share for 100% of Kennecott stock, yielding an estimated total purchase price of $1.77 billion. Requisite approval by two-thirds of Kennecott's shareholders was granted at a special meeting on May 5, 1981.

VII. TRADE AND COMMERCE

16. The relevant product market is the production of molybdenum disulphide ("molybdenum").

17. The relevant geographic market for molybdenum production is the United States.

18. The production of molybdenum in the United States is substantially concentrated. In 1980, the top four firms accounted for 91.55% of production, and the top eight firms accounted for 99.24%. Amax and Kennecott ranked first and third, with 67.79% and 5.6%, respectively.

19. Barriers to entry into molybdenum production are high. Capital costs are high and increasing; reserves are not readily available; and a long lead time is necessary to establish a going concern.

VIII. ACTUAL COMPETITION

20. Amax and Kennecott both are actual competitors in the production of molybdenum in the United States market.

IX. POTENTIAL COMPETITION

21. The relevant market is concentrated, as set forth in Paragraph 18 of this Complaint.

22. Barriers to entry in the relevant market are high, as set forth in Paragraph 19 of this Complaint.

23. Feasible means of entry exist for BP to enter the United States molybdenum production market as an alternative to its acquisition of Kennecott.

24. BP is one of the most likely potential entrants into the relevant market, and there is a reasonable probability that BP is likely to enter this market in the near future by a method other than the acquisition of Kennecott.

25. An alternative method of entry offers a substantial likelihood of ultimately producing deconcentration or other significant procompetitive effects in the United States molybdenum market.

X. EFFECTS OF THE PROPOSED ACQUISITION

26. The effect of the proposed acquisition may be substantially to lessen competition or tend to create a monopoly in the production of molybdenum in the United States market, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) Actual competition between Amax and Kennecott may be substantially lessened;

(b) The likelihood of eventual deconcentration of the highly concentrated molybdenum market may be substantially lessened;

(c) High barriers to entry into the United States molybdenum market may be substantially increased;

(d) The likelihood of interdependent behavior among firms in the United States molybdenum market may be substantially increased;

(e) Additional acquisitions and mergers in the industry may be encouraged; and

(f) Members of the consuming public may be deprived of the benefits of free and unrestricted competition in the production and sale of molybdenum.

XI. VIOLATIONS CHARGED

27. The effect of the proposed acquisition may be substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition staff proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, a statement that solely for purposes of this proceeding respondents will not contest any of the jurisdictional facts of the draft complaint, a further statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that a 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 The British Petroleum Company Limited is a corporation organized, existing and doing business under and by virtue of the laws of England, with its office and principal place of business at Britannic House, Moor Lane, London, England.

Respondent The Standard Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of Ohio, with its office and principal place of business at Midland Building, Cleveland, Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and, in light of respondents' agreement that they will not contest any of the jurisdictional facts of the draft complaint, has jurisdiction of the respondents, and the proceeding is in the public interest.

ORDER

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

(a) *Respondent* means The British Petroleum Company Limited, a corporation, and its subsidiaries (any company or other entity in which it holds more than 50% of the stock or voting securities or voting rights), successors and assigns.

(b) *Amax* means AMAX Inc., a corporation, and its subsidiaries (any company or other entity in which it holds more than 50% of the stock or voting securities or voting rights), successors and assigns.

(c) *Outstanding stock* means stock or securities which have been issued and have not been recalled or purchased by the issuer, and excludes treasury stock.

(d) *Person* means any individual, corporation (including subsidiaries thereof), partnership, joint venture, trust, unincorporated association or organization, or government or agency or political subdivision thereof, or other business or legal entity, other than respondent.

(e) *Molybdenum* means the metallic element Mo.

(f) *Molybdenum company* means any person which in the most recent calendar year for which information is available produced more than 3% of the contained molybdenum produced in the United States in that year.

(g) *Joint venture* means a joint business undertaking by two or more persons, for the purpose of carrying out a particular objective or objectives, pursuant to an agreement which provides for joint contributions to capital, which may include tangible and intangible assets, and some sharing of profits or production in kind.

(h) *Effective date* means the day on which this Order becomes final.

I

It is ordered, That within thirty (30) months from the effective date of this Order respondent divest, absolutely and in good faith, all right, title or interest in or to any stock issued by Amax which

respondent directly or indirectly owns or controls as of the effective date of this Order.

II

It is further ordered, That until the divestiture required by Paragraph I of this Order is completed, respondent shall, at any meeting of the holders of common stock of Amax, cause any of the stock issued by Amax which respondent directly or indirectly owns or controls to be voted in respect of any matter in the same respective proportions as the votes cast by the other holders of common stock of Amax.

III

It is further ordered, That for ten (10) years commencing September 1, 1981 no person who is an officer, director or employee of any other molybdenum company shall be an officer, director or employee of respondent.

IV

It is further ordered, That for ten (10) years following the effective date of this Order respondent shall not, without the prior approval of the Commission, directly or indirectly, (a) acquire (except for investment purposes for the benefit of an employee pension fund) any part of the stock of a molybdenum company, or (b) acquire more than 50% of the assets of a molybdenum company. For purposes of the foregoing clause (b), assets shall be valued in accordance with generally accepted accounting principles.

V

It is further ordered, That for two years following the effective date of this Order respondent shall not, without the prior approval of the Commission, enter into any joint venture or similar arrangement with any other molybdenum company for the production or sale of molybdenum in the United States; and that for an additional three-year period following this two-year period, respondent shall notify the Commission ninety (90) days in advance of entering into any joint venture or similar arrangement with any other molybdenum company for the production or sale of molybdenum in the United States.

VI

It is further ordered, That no acquisition, joint venture or other act or transaction to which respondent is a party shall be deemed immune or exempt from the antitrust laws by reason of anything contained in this Order.

VII

It is further ordered, That within ninety (90) days from the effective date of this Order and on the anniversary of the effective date of this Order in every year thereafter, respondent shall submit to the Commission in writing a verified report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied therewith.

VIII

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