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Complaint

IN THE MATTER OF

ZEIGER &amp; GREEN, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION  
OF THE FEDERAL TRADE COMMISSION AND THE  
FUR PRODUCTS LABELING ACTS

*Docket C-1472. Complaint, Dec. 26, 1968—Decision, Dec. 26, 1968*

Consent order requiring a New York City manufacturing furrier to cease misbranding, falsely invoicing and deceptively guaranteeing its fur products.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Zeiger & Green, Inc., a corporation, and Charles Mitnick and Jack Zeiger, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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 Zeiger & Green, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondents Charles Mitnick and Jack Zeiger are officers of the corporate respondent. They formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are manufacturers of fur products with their office and principal place of business located at 333 Seventh Avenue, New York, New York.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product"

are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled to show that fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed to disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored when such was the fact.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in that said fur products were invoiced to show that the fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 7. Respondents furnished false guaranties that certain of their fur products were not misbranded, falsely invoiced or falsely advertised when respondents in furnishing such guaranties had reason to believe that fur products so falsely guarantied would be introduced, sold, transported or distributed in commerce, in violation of Section 10(b) of the Fur Products Labeling Act.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

## DECISION AND ORDER

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

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

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

1. Respondent Zeiger & Green, 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 333 Seventh Avenue, New York, New York.

Respondents Charles Mitnick and Jack Zeiger are officers of said corporation and their address is the same as that of said corporation.

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

## ORDER

*It is ordered,* That respondents Zeiger & Green, Inc., a corporation, and its officers, and Charles Mitnick and Jack Zeiger, individually and as officers of said corporation, and respondents'

representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding any fur product by:

1. Representing directly or by implication on a label that the fur contained in such fur product is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

2. Failing to affix a label to such fur product showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

B. Falsely or deceptively invoicing any fur product by:

1. Failing to furnish an invoice, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Representing, directly or by implication, on an invoice that the fur contained in such fur product is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

*It is further ordered,* That respondents Zeiger & Green, Inc., a corporation, and its officers, and Charles Mitnick and Jack Zeiger, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any fur product is not misbranded, falsely invoiced or falsely advertised when the respondents have reason to believe that such fur product may be introduced, sold, transported, or distributed in commerce.

*It is further ordered,* That the respondent corporation shall

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forthwith distribute a copy of this order to each of its operating divisions.

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



INTERLOCUTORY, VACATING, AND  
MISCELLANEOUS ORDERS

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KOPPERS COMPANY, INC.

*Docket 8755. Order and Opinion, July 2, 1968*

Order remanding to hearing examiner his order of April 23, 1968, denying respondent's application for leave to take depositions from officials of a third party.

OPINION OF THE COMMISSION

The Commission has before it respondent's appeal from the hearing examiner's order of April 23, 1968, denying respondent's application for leave to take depositions<sup>1</sup> of six named officials of United States Pipe and Foundry Company (hereafter U.S. Pipe). Complaint counsel has filed an answer opposing the appeal.

The ruling below is based upon the examiner's finding that:

\*\*\* all persons whose depositions are sought are expected to testify at formal hearings; taking of depositions will unduly delay the proceedings; and may circumvent the orderly presentation of evidence at formal hearings.

A brief review of the facts is necessary to place the examiner's ruling in its proper perspective. The complaint herein charges respondent, Koppers Company Inc., with developing and maintaining a monopolistic control of the market in Resorcinol. After setting out this charge in broad terms, the complaint goes on to allege that a meeting took place, in March of 1965, between officials of respondent and representatives of U.S. Pipe, at which

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<sup>1</sup> Section 3.33 of the Commission's Rules of Practice provides, in pertinent part, as follows:

§ 3.33 Depositions.—(a) When justified.—At any time during the course of a proceeding, whether or not issue has been joined, the hearing examiner, in his discretion may order the taking of a deposition and the production of documents by the deponent. Such order may be entered upon a showing that the deposition is necessary for purposes of discovery, and that such discovery could not be accomplished by voluntary methods. Such order may also be entered in extraordinary circumstances to preserve relevant evidence upon a showing that there is substantial reason to believe that such evidence could not be presented through a witness at the hearing. Insofar as consistent with considerations of fairness and the requirements of due process and the rules in this part, a deposition should not be ordered when it appears that it will result in undue burden to any other party or in undue delay of the proceeding, and it should not be ordered to obtain evidence from a person relating to matters with regard to which he is expected to testify at the hearing, or to obtain evidence which there is reason to believe can be presented at a hearing without the need for deposition, or to circumvent the orderly presentation of evidence at the hearing.

officials of respondent urged that U.S. Pipe refrain from entering the Resorcinol market. The balance of the complaint deals with respondent's alleged reaction, by price cuts, restrictive agreements and long-term contracts, to U.S. Pipe's announcement that it was constructing a plant for the production of Resorcinol.

It will thus be observed that the entire thrust of the complaint is to respondent's dealings with and reactions to its alleged potential competitor, U.S. Pipe, the cumulative effect of which, it is alleged, caused U.S. Pipe to fail in its attempt to enter the Resorcinol market. The complaint mentions no other competitors, actual or potential, nor does it allege acts or practices directed against any other firm. Thus it is obvious that respondent, to answer these charges, must be prepared to meet the testimony of complaint counsel's prime witnesses, officials of U.S. Pipe.

Respondent's informal request to interview these officials met with polite refusal. Thereafter, respondent moved for leave to take their depositions, pursuant to Section 3.33 of the Commission's Rules of Practice. The denial of respondent's motion forms the basis of this appeal.

Section 3.33 provides that an order for taking of depositions may issue "at any time during the course of a proceeding" upon a showing that it is "necessary for purposes of discovery, and that such discovery could not be accomplished by voluntary methods." A deposition may also issue to "preserve relevant evidence," if it can be established that there is "substantial reason to believe that such evidence could not be presented through a witness at the hearing." Section 3.33 (f) (2) controls the use of depositions taken to preserve evidence. Like Federal Rule 26 (d) (3), it provides for the admission of depositions in evidence upon a finding that the witness is unable for reasons of age, infirmity, etc., to appear to give testimony.

Thus, Section 3.33 (a) provides for depositions "for purposes of discovery," and "to preserve relevant evidence," and Section 3.33 (f) (2) controls the use of the latter type as evidence at the hearing. In conformity to this distinction, Section 3.33 (a) further provides that

Insofar as consistent with considerations of fairness and the requirements of due process and the rules in this part, a deposition should not be ordered \*\*\* *to obtain evidence* from a person relating to matters with regard to which he is expected to testify at the hearing, or *to obtain evidence* which there is reason to believe can be presented at a hearing without the need for deposition or to circumvent the orderly presentation of evidence at the hearing. (Emphasis supplied.)

Since, under subsection (f) (2), the contents of a deposition can



only constitute evidence in a narrow class of circumstances, it follows that subsection (a) prohibits the use of a deposition to preserve evidence when the would-be deponent is expected to present the same material testimonially, or the evidence can be presented at the hearing independently, without recourse to depositions. In both cases, depositions to preserve evidence would serve no useful purpose, since they would be inadmissible in evidence under subsection (f) (2). It is the purpose of this portion of subsection (a) to spare counsel and witnesses the harassment and delay of a "trial-by-deposition," whereby depositions are taken neither for purposes of discovery nor to preserve evidence, but are attempts to secure information that is often marginal, cumulative, already known to counsel or of no substantial value to him, all as a device to clog the record and burden opposing counsel and witnesses with the attendant delay and disruption at the pretrial stage.

In denying respondent's motion on the ground that "all persons whose depositions are sought are expected to testify at formal hearings" the hearing examiner has plainly applied the standards of subsection (a) relating to depositions intended for later use as evidence. However, it is clear that respondent does not seek the requested depositions "to obtain evidence," but "for purposes of discovery," more specifically, for use in cross-examination.<sup>2</sup>

If such depositions were to be unavailable merely because the persons whose depositions are sought are expected to testify, respondent plausibly argues that effective cross-examination would be impossible.<sup>3</sup> It is not the purpose of subsection (a) to deny to respondent advance knowledge of the testimony of complaint counsel's witnesses. The right to effective cross-examination is embodied in the Administrative Procedure Act,<sup>4</sup> and is customarily protected by the use of depositions. Although this discovery mechanism, like others, is susceptible to abuse, this possibility is not suggested by the facts before the Commission at this juncture. It would appear that the testimony of the witnesses whose depositions are sought may be of substantial importance.

In addition to the grounds previously mentioned, the hearing examiner premised his ruling upon his finding that the "taking of depositions will unduly delay the proceedings, and may circumvent the orderly presentation of evidence at formal hearings." There is no indication in the record now before us, however, that

<sup>2</sup> In its brief on appeal, respondent expresses as its chief concern the difficulty of preparing for cross-examination without advance knowledge of the testimony to be presented by complaint counsel's witnesses.

<sup>3</sup> R.B.A., p. 16.

<sup>4</sup> 60 Stat. 241 (1946), 5 U.S.C. § 556(d) (1967).

the granting of respondent's application would delay the opening of formal hearings. All the witnesses whose depositions are sought are located in the same city. Respondent asserts in its brief on appeal that all six could be deposed in a relatively few days. Formal hearings are not scheduled to begin for several weeks. Any possibility of delay might perhaps be avoided by the simple expedient of including in an order granting respondent's application a provision limiting its effect to such depositions as respondent is able to obtain by an agreed-upon date well in advance of formal hearings.<sup>5</sup>

In the circumstances, we believe that this matter should be returned to the hearing examiner for further consideration in the light of this opinion and the other opinions in the discovery matters decided in this case today. Any order granting respondent's application should limit the scope of inquiry to matters necessary to prepare a defense, and should also contain such safeguards as may be necessary to prevent improper disclosures of trade secrets or other privileged or confidential information.

Commissioner MacIntyre concurred in the result.

#### ORDER OF REMAND TO HEARING EXAMINER

Upon consideration of the appeal of respondent from the hearing examiner's ruling of April 23, 1968, and for the reasons stated in the accompanying opinion,

*It is ordered,* That the matter be remanded to the hearing examiner for further consideration.

Commissioner MacIntyre concurred in the result.

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#### KOPPERS COMPANY, INC.

*Docket 8755. Order and Opinion, July 2, 1968*

Order denying appeal to produce certain documents and request for oral argument and remanding case to hearing examiner for further proceedings.

#### OPINION OF THE COMMISSION

We have before us the appeal of United States Pipe and Foundry Company (hereafter referred to as U.S. Pipe), a corporation not a party to this proceeding, from the ruling of the hearing examiner embodied in orders filed respectively April 11, 1968, and April 15, 1968 (Prehearing Order No. 2 and an amendment

<sup>5</sup> In its reply memorandum on appeal, respondent has indicated its willingness to comply with "any reasonable order which would enable it to take these depositions and still ensure that no delay will come about." Respondent's Memorandum in Reply, p. 2.

thereto), which, among other things, denied in part and granted in part the motion of U.S. Pipe to limit or quash subpoena duces tecum issued on the application of counsel for respondent. Respondent, on April 29, 1968, filed a brief in opposition to the appeal.

The hearing examiner, in amended Prehearing Order No. 2, directed the production of the subpoenaed documents on April 22, 1968, under conditions set forth in such order. Under § 3.35 of the Commission's Rules of Practice it is provided that an appeal from a ruling such as that here involved shall not operate to suspend the hearing unless otherwise ordered by the hearing examiner or the Commission. U.S. Pipe, on or prior to April 22, 1968, made no motion to stay the matter pending the appeal, and made no appearance on April 22, 1968, in compliance with the examiner's order. Accordingly, the examiner, on April 23, 1968, certified to the Commission the failure of U.S. Pipe to comply with the subpoena. The examiner, in his certification, noted that no claim was made concerning the breadth of the disputed paragraph of the subpoena in the written motion submitted to him. Thereafter, on April 26, 1968, U.S. Pipe belatedly sought a stay of the subpoena pending decision by the Commission on the appeal. The examiner certified this request to the Commission on April 29, 1968, with a recommendation that the return date of the subpoena involved be extended to and including the tenth day after the decision of the Commission on the appeal, if the Commission sustains the examiner in the issuance of the subpoena as limited.

The portion of the subpoena in dispute reads as follows:

4. All documents including any graphs, charts, tables, tabulations, and compilations prepared by your company, any officer or employee of your company, or by any other person or organization:

(a) which concern, discuss, study or project the contemplated entry of United States Pipe and Foundry Company into the business of production and sale of commercial resorcinol and resorcinol products including, among others, the following matters: (i) the costs of production, (ii) the contemplated volumes of production, (iii) any relationship of the cost of production with volume, (iv) and profitability of production, (v) price levels, and (vi) competition but specifically excluding references to specific actual customers;

(b) those documents which reflect or relate to the actual implementation of the plans and studies for the entry of United States Pipe and Foundry Company into the market for resorcinol production and sale, including those matters referred to in Paragraph 4(a) above, but excluding specific sales to specific customers.

The hearing examiner, in amended Prehearing Order No. 2, included protective provisions dealt with hereinafter.

U.S. Pipe, on the merits of its appeal, makes three arguments:

first, that the documents sought are irrelevant; secondly, that the subpoena is too sweeping; and, finally, that the subpoena seeks trade secrets, the disclosure of which, it is contended, would be injurious to the public interest and to U.S. Pipe. On this last point U.S. Pipe additionally argues that the order of the hearing examiner does not afford it sufficient protection. The appellant finally requests oral argument on its appeal.

We are not persuaded that the hearing examiner has clearly abused his discretion, but our consideration of this matter leads us to believe that one of the three bases for objection advanced by U.S. Pipe, the protection of U.S. Pipe's trade secrets, may warrant reconsideration by him. Moreover, U.S. Pipe's objection to the breadth of the subpoena, the third basis cited in its appeal, has not been considered by the hearing examiner. Since we are remanding for reconsideration of the question of protection of trade secrets, he will have an opportunity to consider the question of breadth.

With regard to relevancy, we think the hearing examiner ruled properly. The allegations of the complaint with respect to the Respondent's alleged contacts with U.S. Pipe and the effects of Respondent's alleged activities to exclude U.S. Pipe may, or may not, have been a necessary concomitant to the charge of monopolization by Koppers, but the allegations in the complaint establish the relevancy of the documents sought in a discovery proceeding. The ultimate issues of the materiality and relevancy of material sought should be ruled upon at the time they are sought to be introduced. Any questions with respect to those rulings may be presented to the Commission upon review, if any is sought, of the entire record.

We feel constrained to point out that unless there is a clear showing of an abuse of discretion the Commission, in the absence of unusual circumstances, will not disturb a ruling of a hearing examiner in matters involving procedure and discovery. See *Topps Chewing Gum, Inc.*, Docket No. 8463 (order issued July 2, 1963) [63 F.T.C. 2196]; *Associated Merchandising Corporation*, Docket No. 8651 (order issued September 23, 1965 [68 F.T.C. 1175]), and order issued November 13, 1967 [72 F.T.C. 1015]; and *American Brake Shoe*, Docket No. 8622 (order issued September 1, 1965) [68 F.T.C. 1169].

The second basis for U.S. Pipe's appeal is that the subpoena is too sweeping. We are not persuaded that U.S. Pipe's documents which "concern, discuss, study or project" its contemplated entry into the resorcinol market, *must necessarily* extend to the details

of U.S. Pipe's "costs of production," "contemplated volume of production," "relationship of the cost of production with volume," "profitability of production," or "price levels." If Koppers wishes to defend this law suit by showing that U.S. Pipe decided not to enter the market for reasons unrelated to any activities of Koppers, then it might be able to do so with the documents sought under Item 4(a) and (b) without the specific data enumerated in subparagraphs (i)-(v).

Obviously, it may be difficult to separate out some of this raw data which would fall into the area of trade secrets from memoranda and other documents which would relate to its reasons for not entering this market.

This brings us to the third basis for appeal: the argument that the material sought by Koppers constitutes trade secrets which U.S. Pipe should not be compelled to disclose. The hearing examiner is in the best position to determine how this can best be accomplished. In his Prehearing Order No. 2 ordering the production of the subpoenaed documents the hearing examiner ordered protective provisions as follows:

3. The motion of United States Pipe and Foundry Company is granted to the extent that all papers called for by Paragraph 4 of said subpoena shall be produced at the prehearing conference to be held April 22, 1968, and shall be exhibited to and placed in the custody of William Simon and Paul d'Hedouville, counsel for respondent, provided, however, that said William Simon and Paul d'Hedouville as counsel for respondent shall first undertake and agree that all such documents shall be retained in their personal custody, shall not be copied or abstracted, and that no information contained in any of them shall be disclosed to any other person except on 10 days notice to Thad G. Long, counsel for intervenors, who may then arrange with all counsel and the hearing examiner for a suitable date to offer testimony and other evidence seeking *in camera* treatment in compliance with Rule 3.45 and may secure a ruling thereon by the hearing examiner before any disclosure may be made. And, on the further condition that said William Simon and Paul d'Hedouville further undertake and agree to return all such documents not admitted in evidence to said Thad G. Long at the conclusion of the testimony of witnesses from United States Pipe and Foundry Company.

We are still not wholly satisfied at this point that the protective provisions which he has proposed are adequate. At least we think that before adopting those provisions he should give consideration to the procedures adopted in *Mississippi River Fuel Corp.*, Docket No. 8657, Order June 8, 1966 [69 F.T.C. 1186]. Here again, however, he is closer to the case and is in a better position than the Commission to consider in the first instance what protective provisions would be most appropriate. He should be satisfied that Koppers have the material which is necessary, but, to the extent

possible, in a form which provides the adequate protection of the trade secrets of U.S. Pipe.

U.S. Pipe has requested permission to present oral argument to the Commission in this matter. We think in view of our disposition of the appeal that the oral argument should more properly be addressed to the hearing examiner.

Finally, U.S. Pipe having failed to make timely request and receive a stay in the effective date of the hearing examiner's order and having failed to comply with the subpoena as directed is now technically in violation of the examiner's order. The hearing examiner, in his second certification of April 29, 1968 (made upon receipt of U.S. Pipe's belated request for a stay), by recommending an extension of time for the return date of the subpoena, in the event the Commission denies the appeal, has apparently concluded that the failure to comply with his order was inadvertent and not willful. Accordingly, we will not press further on this deficiency.

An appropriate order is issued herewith.

Commissioner MacIntyre concurred in the result.

ORDER DENYING APPEAL FROM EXAMINER'S ORDER AND  
REQUEST FOR ORAL ARGUMENT AND REMANDING TO  
HEARING EXAMINER FOR FURTHER PROCEEDING

United States Pipe and Foundry Company appealed from the examiner's ruling requiring it to produce certain documents in response to a subpoena duces tecum issued upon the application of respondent herein and requested oral argument on the appeal; and

The Commission having determined for the reasons stated in the accompanying opinion that such appeal and request for oral argument should be denied and that this matter should be remanded to the hearing examiner for further proceedings in accordance with such opinion:

*It is ordered,* That the appeal of the United States Pipe and Foundry Company from the hearing examiner's ruling and its request for oral argument of its appeal is denied.

*It is further ordered,* That the hearing examiner's order of compliance with the subpoena duces tecum issued against United States Pipe and Foundry Company on March 12, 1968, be vacated and that the hearing examiner consider the arguments of the United States Pipe and Foundry Company and those of respondent in accordance with the accompanying opinion, make such determinations as the hearing examiner deems appropriate, and enter such further orders as may be justified and appropriate in light of such arguments.

Commissioner MacIntyre concurred in the result.

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KOPPERS COMPANY, INC.

*Docket 8755. Order, July 2, 1968*

Order granting respondent's request to file interlocutory appeal and vacating hearing examiner's order directing hearings in more than one city by restricting hearings to Pittsburgh only.

ORDER GRANTING RESPONDENT'S INTERLOCTORY APPEAL AND  
VACATING EXAMINER'S ORDER FOR HEARINGS IN  
MORE THAN ONE PLACE

This matter having come before the Commission on the request by respondent Koppers Company, Inc., pursuant to Rule 3.23 (a) for permission to file an interlocutory appeal from the order of the examiner dated May 17, 1968, granting the motion of complaint counsel to hold hearings in three cities, New York, Pittsburgh, and Birmingham, Alabama; and

The Commission having considered said request, the order of the examiner dated May 17, 1968, and all of the memoranda directed to the examiner by the parties including complaint counsel's motion of April 29 and affidavit of May 10 and respondent's opposition memorandum of May 6 and answer of May 16; and

The Commission believing that counsel supporting the complaint has clearly failed to carry the burden of establishing the presence of "unusual and exceptional circumstances" required to justify the holding of hearings in more than one place under Section 3.41 (b) of the Commission's Rules in accordance with the Commission's order of April 9, 1968, in *Universe Chemicals*, Docket 8752 [73 F.T.C. 1259]:

*It is ordered*, That the respondent's interlocutory appeal be granted.

*It is further ordered*, That the hearing examiner's order granting complaint counsel's motion for hearings in more than one place be vacated and that the hearings be held only in Pittsburgh.

Commissioner MacIntyre did not concur.

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KOPPERS COMPANY, INC.

*Docket 8755. Order and Opinion, July 2, 1968*

Order denying application of respondent for subpoena duces tecum and for the release of confidential information.

## OPINION OF THE COMMISSION

Respondent herein, charged with violating Section 5 of the Federal Trade Commission Act, on March 28, 1968 applied to the hearing examiner, under § 3.34 (b) of the Commission's Rules of Practice, for a subpoena duces tecum directed to complaint counsel to produce the records which it listed contained in the Commission's files, or, in the alternative, for the production of such records pursuant to § 3.36 of the Commission's Rules of Practice. The examiner, on March 28, 1968, certified the application (which he treated as a motion) to the Commission, holding that he was without power to grant or deny the request under §3.22(a) of the Commission's rules. The examiner recommends that the application be denied on a number of grounds: first, because it has not been shown that there has been a refusal by complaint counsel to exhibit the documents sought; secondly, it has not been shown that there are documents of the kind desired; thirdly, the subpoena, if issued, would be so broad as to be unreasonable; and, finally, that the application might better await the disclosure of complaint counsel's evidence, which would permit a more limited request based on the facts that respondent would be required to meet.

Simultaneously with the filing of the application, respondent, through its attorney, sent a letter to the Commission, requesting, pursuant to the provisions of the new public information law (81 Stat. 54 (1967); 5 U.S.C. § 552, as amended, referred to hereafter as the Public Information Act), that the Commission make available to Koppers Company, Inc., copies of listed documents. The specifications of this request essentially duplicate those in the application for subpoena duces tecum, although there are some differences.<sup>1</sup>

Respondent, on April 3, 1968, filed with the Commission a memorandum in connection with the certification of the subpoena duces tecum. Complaint counsel filed a memorandum on April 17, 1968, in opposition to both requests and respondent, on April 23, 1968, filed a further memorandum in reply.

Before considering the merits of the request for information it is necessary to comment on the procedural aspects of seeking the

<sup>1</sup> One main item of information sought in the letter request which does not seem to be covered in the subpoena application is that which reads as follows: "Any opinion, order, statement of policy or directive by a Member or Members of the Federal Trade Commission which would state those reasons for the issuance of the complaint against this company (Dkt. 8755). On this request the Commission would make available to the respondent any documents coming within the terms of this specification which are on the public record. However, respondent has not identified any such documents, and an examination of the Commission's records reveals that there are none described on the public record.



documents directly from the Commission under the Public Information Act. The Commission's rules do not provide for a release of confidential information by direct request in an adjudicative case. Respondent concedes in its letter of March 28, 1968, that the information sought is for use by the respondent in preparation of its defense in the instant proceeding. In such circumstances the Commission's rule § 3.36 is applicable. This rule requires that application be made in the form of a motion to the examiner, who must certify such to the Commission with his recommendation. This precludes a direct request under § 4.11 of the Commission's rules.<sup>2</sup> Nevertheless, in this instance, since the request under the Public Information Act largely duplicates the application to the hearing examiner, we will not exclude it from our consideration because of the improper procedural approach but will view it as a supplement to the application filed with the examiner.<sup>3</sup>

The request for documents, as the examiner found, is extremely broad. The application covers all documents from January 1, 1962, to the date of the application (March 28, 1968), in the following categories:

1. All documents of any nature, kind or description, including mechanical recordations, prepared by or otherwise received from United States Pipe and Foundry Company relating or referring to the domestic production and sale of resorcinol or which in any way relate or refer to this respondent or any officers or employees thereof;

2. All documents of any nature, kind or description prepared by or received from fifteen companies listed (including such as Goodyear Tire and Rubber Company, United States Rubber Company, Deering-Millekin Company, and others), whose officer, employees or representatives have been identified by complaint counsel as being persons who may be called to testify on behalf of the complaint;

3. All documents, including correspondence, of any nature, kind or description received by the Commission in connection with this matter from companies other than those referred to in specification number 2, above;

<sup>2</sup> Moreover, § 3.22 of the rules states that during the time a proceeding is before a hearing examiner, all motions therein, except those filed under § 3.42(g) [Disqualification of hearing examiner] shall be addressed to the hearing examiner and if within his authority shall be ruled upon by him. Any motion upon which he has no authority to rule is to be certified to the Commission with his recommendation.

<sup>3</sup> In this connection, it should be pointed out that the materials which may be obtained by a party under § 3.36 of the Rules (now and prior to the amendment of that Rule on May 1, 1968) is more broad than the material which is available to the public under the Public Information Act.

4. All signed statements received from any individual which relate, refer to or otherwise concern the domestic production and sale of resorcinol and resorcinol products;

5. All documents, to the extent not produced in response to prior paragraphs, which reflect, refer to or otherwise concern the potential, contemplated or actual entry of a company into the market for the domestic production and sale of resorcinol;

6. All documents, studies and surveys which reflect, refer to or otherwise concern competitive conditions or practices involving the domestic production and sale of chemicals other than resorcinol;

7. All documents of any nature, kind or description which reflect, refer to or otherwise concern the revisions by this respondent of all contracts for the sale of resorcinol in December 1966 whereby all customers were released from contractual obligations to purchase in excess of 50 percent of their resorcinol requirements from Koppers;

8. Such documents of any nature, kind, description or origin which would show that this proceeding is brought as a means of ensuring the competitive survival or prosperity of United States Pipe and Foundry Company.<sup>4</sup>

Subsection (b) of Rule 3.36 (unchanged by the May 1, 1968, amendment), the rule here applicable, specifies as to a motion seeking confidential Commission materials or information as follows:

The motion shall specify as exactly as possible the material to be produced, the nature of the information to be disclosed, or the expected testimony of the Commission official or employee, and shall contain a statement showing the general relevancy of the material, information, or testimony, and the reasonableness of the scope of the application, together with a showing that such material, information, or testimony is not available from other sources by voluntary methods or through other provisions of the rules in this chapter.

Respondent, seeking in the alternative to justify its request under § 3.36, cites circumstances which it argues go to the relevancy of the documents. It makes no further showing. It does not meet, or even attempt to meet, the other requirements of Rule 3.36. There is no showing as to the reasonableness of the scope of the application, nor is there a showing that such material or information is not available from other sources by voluntary meth-

<sup>4</sup> The request made under the Public Information Act differs on some of the specifications, as stated above, but in view of our disposition of the matter we will not discuss the particulars of such differences.

ods or through other provisions of the rules in the chapter.<sup>5</sup>

Respondent, in its reply of April 23, 1968, suggests, apparently for the first time, certain considerations which might bear on a claim of the unavailability from other sources of the documents sought under Specification 1. It mentions, for instance, that it has obtained discovery from United States Pipe and Foundry and, having what it believes to be some reason to question the completeness of the material produced, is now pressing for discovery from complaint counsel. It cannot use its mere assumptions as to incompleteness as a basis for claiming that the requested documents are not available from other sources. In any event, any such justification, if that is what it is, should have been made in the first instance to the hearing examiner so that he would have had all the facts and circumstances necessary to an informed determination and recommendation under § 3.36.

We are, by separate Opinion and Order, remanding the appeal of U.S. Pipe from the Orders of the hearing examiner with respect to the Subpoena Duces Tecum directed to it by Koppers to the hearing examiner with directions to reconsider his orders in the light of that opinion. In view of that determination, it is our conclusion that the respondent's request for U.S. Pipe documents from the Commission is premature.

Respondent, in its reply memorandum, further asserts that complaint counsel has been ordered to turn over to respondent by May 15, 1968, all documents which he intends to use in his case and that "[t]he subpoena is merely intended to procure any documents received by complaint counsel which he decides not to use in his own case" (p. 4, reply memorandum filed April 23, 1968). This seems to be a different and more limited request from that contained in the specifications of the subpoena. However, the examiner construed the application as a "very broad discovery of all documents in the possession of the Federal Trade Commission dated January 1, 1962, to date relating to the subject matter of the complaint." In any event, respondent cannot serve such a dragnet subpoena on the Commission and then attempt to defend its broad scope by claiming that in fact fewer documents are actually desired than are requested. It would appear that in fact respondent has already received many of the documents which it

<sup>5</sup> Respondent does not contend that any of the materials requested are those which respondent is entitled to by law. Moreover, the sweeping nature of the request and the general justification therefor will admit of no determination on such question. To the extent, however, that there are identifiable documents in the Commission's files coming within this exception no further reference to the Commission is necessary. A request for any such documents would be governed by § 3.34 of the Commission's rules.

seeks under this subpoena.<sup>6</sup> Respondent is under a duty to examine these documents and thereafter determine precisely what additional documents it believes it requires, and is entitled to.

We agree with the examiner that on its face, the application for subpoena duces tecum is, for an adjudicative proceeding, unreasonably broad. The information sought covers a lengthy period (*i.e.*, six years), comprehensively embraces whole files or categories of documents with little or no differentiation or particularization, and the request by its nature seems to be designed to uncover numerous documents in the hope that something useful might turn up. Such a request, we believe, is unreasonable in scope and is not justified under the Commission's rules. See *Coro, Inc. v. Federal Trade Commission*, 338 F. 2d 149,153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). As the examiner pointed out in his certification, a more orderly procedure would be for respondent to wait for the disclosure of all of complaint counsel's evidence and on the basis of these documents frame an application for discovery based on the facts which respondent would be required to seek.

Rule § 3.36(b), which will be applied by the hearing examiner under the May 1, 1968, amendment, requires that respondent ". . . shall specify *as exactly as possible* the material to be produced . . ." (emphasis added). This is not to be interpreted to mean a particular identifiable document (the identity of which will frequently not be known to respondent); but it does require greater specificity than a general request for ". . . all documents of any nature, kind or description . . ." so that there can be no doubt exactly what materials must be furnished.

In all the circumstances, we conclude that the request here made is one that has not been presented to the examiner with a reasonable effort to accord with the requirements of § 3.36. The Commission, through amendments of its rules and otherwise, is making serious efforts to expedite the determination and disposition of both adjudicative and non-adjudicative matters. If these ends are to be achieved, it requires that diligent efforts be made, by both the Commission staff and counsel representing respondents and proposed respondents, to initially comply with the letter and spirit of the Commission rules. The Commission will look with

<sup>6</sup> Complaint counsel, in his memorandum of April 17, 1968, asserts that almost all of the documents in Specification 2 have been furnished and that the remaining documents will be furnished; that the statements covered by paragraph 4 are already in respondent's possession; that all specifications under paragraph 5 have been, to the best of complaint counsel's knowledge, delivered to respondent; that documents in paragraph 6, known to complaint counsel, were either obtained from respondent or have already been furnished respondent; and, finally, that complaint counsel has no such documents as those referred to under paragraph 7 other than such already furnished by respondent to the Commission's staff.

disfavor upon any efforts to use its processes of expedition as devices for delay.

Respondent's application for a subpoena duces tecum, including its supplemental request by letter of March 28, 1968, and, in the alternative, its request under § 3.36 for the production of documents will be denied. This, however, will be without prejudice to the respondent to apply for a subpoena duces tecum which it can justify under the Commission's rules. In view of the amendment of Rule § 3.36 on May 1, 1968, any new application will be governed by that Rule, as amended.

An appropriate order will be issued to accompany this opinion.

ORDER DENYING APPLICATION FOR SUBPOENA DUCES TECUM  
AND REQUEST FOR RELEASE OF CONFIDENTIAL RECORDS

This matter is before the Commission upon the application of Koppers Company, Inc., for subpoena duces tecum or, in the alternative, for the production of confidential records; and

The Commission having considered said application, which was treated by the hearing examiner as a motion and certified to the Commission with recommendation that it be denied, the memorandum in opposition thereto submitted by counsel supporting the complaint and the memorandum by respondent in reply to complaint counsel's opposition; and

The Commission being of the opinion that respondent has not made a showing which would warrant issuance of the subpoena or granting of the request for release of confidential information; therefore, for the reasons set forth in the accompanying opinion,

*It is ordered*, That the application of Koppers Company, Inc., for subpoena duces tecum and for release of confidential records be and it hereby is denied.

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LEHIGH PORTLAND CEMENT COMPANY-

*Docket 8680. Order and Opinion, Aug. 2, 1968*

Order remanding to the hearing examiner the question of subpoenas directed to third-party concrete companies.

OPINION OF THE COMMISSION

This matter is before the Commission upon the appeals of respondent and fourteen third parties. On January 11, 1968, subpoenas duces tecum were issued to eighty-one ready-mixed concrete companies on behalf of respondent. On January 25, 1968, thirty-six additional subpoenas duces tecum were issued to port-

land cement manufacturers on behalf of respondent. Subsequently, forty-seven ready-mix firms and twenty-two portland cement manufacturers complied with the subpoenas. Motions to quash were filed by twenty-nine ready-mix firms and thirteen portland cement firms.<sup>1</sup>

All third-party motions to quash claimed that some of the information sought by various subpoena specifications was highly confidential and should not be divulged to respondent or respondent's counsel but only to an independent accounting firm in accordance with the procedure utilized in *Mississippi River Fuel Corporation*, Docket No. 8657 (orders issued June 8, 1966 [69 F.T.C. 1186], and July 15, 1966 [70 F.T.C. 1759]). The portland cement firms also claimed that the subpoenas were unduly broad as to geographic scope.

On May 29, 1968, the examiner ruled on the motions to quash the January 11, 1968, subpoenas, and on June 14, 1968, he ruled on the motions to quash the January 25, 1968, subpoenas. The examiner ruled that the subpoenas should be modified and that much of the sales and pricing data called for by various specifications should be submitted to a disinterested accounting firm which would compile and present the material to respondent's counsel in such a manner that no individual company's confidential arrangements or data would be revealed. The examiner also ordered that the geographic scope of the subpoenas directed to the portland cement manufacturers should be restricted.

Respondent filed two appeals from these rulings on the primary ground that the restrictive *Mississippi River* confidentiality procedure impairs respondent's right to prepare adequately for cross-examination and needlessly prejudices respondent's ability to conduct an effective defense, especially when sufficient protection can be afforded by other, less prejudicial means. Many third parties filed answers defending the examiner's ruling. Additionally, fourteen third parties also filed appeals on the ground that the examiner should have included even more subpoena specifications in the *Mississippi River* treatment ordered.

The examiner stated in his orders that inasmuch as some of the specifications in this proceeding are similar to those at issue in the *Mississippi River* case, and despite some misgivings as to the propriety of this treatment in this instance, he nevertheless was bound by Commission precedent to order the use of the same procedures.<sup>2</sup>

<sup>1</sup> Six firms receiving subpoenas had neither filed motions nor fully complied with the subpoenas as of the dates of the examiner's rulings on the motions to quash.

<sup>2</sup> Order Modifying Subpoenas *Duces Tecum*, p. 4 (May 29, 1968), p. 5 (June 14, 1968).

We believe that the examiner has incorrectly interpreted our decisions in the *Mississippi River* case. The Commission in that case neither stated nor implied that henceforth such treatment was to be mandatory. We merely held that under the facts of that proceeding the treatment ordered was appropriate. The Commission was, and is, loath to substitute its judgment for the examiner's judgment on such matters. This requires, however, that the examiner must actively and independently evaluate all of the countervailing factors in reaching his decision. The examiner, because of his proximity to the case, is, in the first instance, in a far better position to assess the multitude of variables inherent in the delicate balancing of interests between the respondent's need to know sensitive information and the third party's need to protect the same valuable information from his competitor. It is indeed conceivable that, depending on the particular facts, similar specifications may require dissimilar treatment in order to insure the most equitable resolution of these conflicting interests. Because of the examiner's misconstruction of the *Mississippi River* opinions, we are not convinced that such evaluation has been given to this matter.

Neither the Commission nor the courts have given recognition to an absolute trade secret privilege.<sup>3</sup> The revelation of a trade secret will be compelled if it is indispensable to the proceeding.<sup>4</sup> Nevertheless, the Commission and the courts have hesitated to order disclosure absent a clear showing of immediate need for the requested information. Once disclosure is deemed necessary, conditions have usually been imposed which limit the use of the information only to the litigation and which prevent disclosure to nonparty competitors.<sup>5</sup>

The techniques by which protection has been provided vary as much as the subjects protected. The procedure adopted in *Mississippi River* has been used on a number of occasions.<sup>6</sup> Nevertheless, it is not the only available solution. At this juncture, we are uncertain that the examiner gave adequate consideration to whether all the information at issue was entitled to protection and, if so, whether the *Mississippi River* treatment provides the best available resolution to the opposing interests of the respondent and the third parties.

<sup>3</sup> See generally, E. Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: The Hearing*, 116 U. Pa. L. Rev. 401 (1968).

<sup>4</sup> *Federal Trade Commission v. Frederick A. Clarke*, 3 S.&D. 406 (S.D. Cal. 1941), *aff'd*, 128 F. 2d 542 (9th Cir. 1942).

<sup>5</sup> E. Gellhorn, *supra* note 3, at 409.

<sup>6</sup> See, e.g., *Cities Service Oil Co. v. Celanese Corporation*, 10 F.R.D. 458 (D. Del. 1950); *Empire Rayon Yarn Co. v. American Viscose Corp.*, 160 F. Supp. 334 (S.D.N.Y. 1958).

The test to apply to requests for confidential protection of business records and trade secrets is whether public disclosure will cause a clearly defined serious injury. It has been suggested that, for a fair resolution of a business secret claim, an examiner should consider, in determining whether disclosure will cause serious injury, such factors as:

1. How many people have knowledge of the supposedly "secret" information? Will disclosure increase that number significantly?
2. Does the contested information have any value to the possessor? To a competitor? Is that value substantial?
3. Did the party possessing the information incur any expense in this development? Has he had a sufficient opportunity to realize an adequate return on that investment?
4. What damage, if any, would the possessor of the secret suffer from its disclosure? What advantages would his competitors reap from disclosure?
5. What benefits are likely to flow from disclosure? To whom? Are they significant? In this connection, what is the public "need" for disclosure? Can it be satisfied in any other way?<sup>7</sup>

Because of the possibility that the examiner's impending mandatory retirement might have occurred prior to the completion of this litigation, the parties have recently agreed to the substitution of a new hearing examiner. Under the circumstances, we believe it appropriate to return this matter to the new examiner for reconsideration.<sup>8</sup> An appropriate order will be entered.

Commissioner MacIntyre did not participate.

#### ORDER OF REMAND TO HEARING EXAMINER

Upon consideration of the appeals of respondent and fourteen third party concrete companies from the hearing examiner's rulings of May 29, 1968, and June 14, 1968, and for the reasons stated in the accompanying opinion:

*It is ordered,* That this matter be remanded to the hearing examiner for further consideration.

By the Commission, with Commissioner MacIntyre not participating.

<sup>7</sup> E. Gellhorn, *supra* note 3, at 422-423. The intriguing suggestion has also been offered that to protect the Commission's concern about an incomplete public record, while also preventing unwarranted disclosure, the party seeking protection could be required to prepare a non-confidential summary of the document or testimony for inclusion in the public record. *Id.*

<sup>8</sup> The examiner appears to have given adequate consideration to the geographic scope of the subpoenas addressed to portland cement companies. However, in light of our disposition of the primary basis for these appeals, we believe it is appropriate to give the new examiner an opportunity to make his own judgment on this aspect also.



## SUBURBAN PROPANE GAS CORPORATION

*Docket 8672. Order, Aug. 8, 1968*

Order granting leave to file appeal from hearing examiner's order and for Phillips Petroleum to file comments.

## ORDER GRANTING PERMISSION TO FILE AN INTERLOCTORY APPEAL

This matter is before the Commission on respondent's request for leave to file an interlocutory appeal from the hearing examiner's order of July 19, 1968, and for summary reversal of that order. The Commission has determined that the request for permission to file the interlocutory appeal should be granted and the request for summary reversal of the hearing examiner's order be denied. The Commission has further determined that the Phillips Petroleum Company should be granted an opportunity to file whatever comments it deems appropriate within five (5) days after service of respondent's appeal brief upon it. Accordingly,

*It is ordered,* That respondent's request for permission to file an interlocutory appeal from the order of the hearing examiner dated July 19, 1968, be, and it hereby is, granted.

*It is further ordered,* That respondent's request for the summary reversal of that order be, and it hereby is, denied.

*It is further ordered,* That Phillips Petroleum Company be, and it hereby is, authorized to file whatever comments it deems appropriate in response to respondent's appeal within five (5) days after service upon it of the appeal brief.

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LEHIGH PORTLAND CEMENT COMPANY

*Docket 8680. Order and Opinion, Aug. 9, 1968*

Order denying respondent's appeal from hearing examiner's order refusing to quash subpoenas duces tecum.

## OPINION OF THE COMMISSION

This matter is before the Commission upon the interlocutory appeal of respondent. This appeal, filed pursuant to § 3.35(b) of the Commission's rules of practice, is based upon the hearing examiner's order of March 21, 1968, denying respondent's motion to quash complaint counsel's subpoena duces tecum.

The subpoena, directed to respondent, seeks specific evidentiary market data concerning five acquisitions. The hearing examiner concluded that the specifications are "utterly precise and specific" and that "no suggestion to the contrary has been made [by

respondent] or implied.”<sup>1</sup> Respondent’s appeal is based upon the sole ground that the subpoena constitutes “a postcomplaint investigation in contravention of the Commission’s Rules of Practice as articulated in the Commission’s decision in *All-State Industries of North Carolina, Inc.*, Docket 8738 (Nov. 13, 1967) [72 F.T.C. 1020].”<sup>2</sup> Complaint counsel invoke the *All-State* decision in support of their assertion that the subpoena is properly within the bounds of reasonable postcomplaint discovery.

Because of numerous questions which have risen as a result of the earlier *All-State* decision, we have recently issued a supplemental clarifying opinion. The original opinion in *All-State* held that the hearing examiner’s order requiring respondent to give complaint counsel access to certain files for examination and copying was in fact in the nature of an investigational subpoena. We then stated:

While there may be innumerable instances where such broad specifications may be generally relevant, reasonable in scope, and within the bounds of proper discovery, *it is incumbent upon the moving party, in explaining the reasonableness of scope, to offer some explanation for the failure to specify the needed documents more exactly and for the failure to obtain the requested information by other less burdensome means* \*\*\*.<sup>3</sup>

In *All-State*, the requisite showing was not made by complaint counsel. Hence, we granted the respondent’s motion to quash. In this matter, it is clear that complaint counsel and the hearing examiner considered the *All-State* guidelines. Further, the hearing examiner’s March 21, 1968, order specifically finds that complaint counsel convincingly made the necessary explanations. The order indicates that the examiner scrutinized the subpoena from every possible viewpoint. The examiner stated that with utmost care and diligence he read, analyzed, evaluated, and tabulated “every scrap of respondent’s memoranda and supporting affidavits.”<sup>4</sup> The examiner also devoted an entire prehearing conference to a detailed discussion of complaint counsel’s subpoena request.<sup>5</sup> We, therefore, conclude that the examiner was well aware of the Commission’s rules of practice and precedents, and that he carefully applied them to the present situation. Respondent has failed to make a satisfactory showing that the examiner abused his discretion or acted in an arbitrary or capricious manner.

More importantly, the Commission’s policy (articulated in the

<sup>1</sup> Order Denying Motion to Quash, p. 5 (March 21, 1968).

<sup>2</sup> Appeal to the Commission, p. 2 (April 2, 1968).

<sup>3</sup> *All-State Industries of North Carolina*, p. 7 (November 13, 1967), (emphasis added) [72 F.T.C. 1020, 1025].

<sup>4</sup> Order, p. 16.

<sup>5</sup> Tr. 205-404.

*All-State* opinions), of requiring complaint counsel to have evidence sufficient to support a *prima facie* case before issuance of the complaint, is merely an internal "housekeeping" matter. It is not a matter of concern to a respondent or the hearing examiner in dealing with a request for discovery after complaint. In dealing with discovery requests, the sole criteria to be applied is that set forth in §§ 3.31 through 3.37 of the rules of practice. No legal right has been conferred upon a respondent, and no burden imposed upon the reviewing courts, to police the implementation of the Commission's internal policies concerning the conduct of its staff.

The examiner has held that complaint counsel's discovery request has met the reasonable objective standard set forth in the rules of practice—*i.e.*, the documents are relevant and the scope of the subpoena is reasonable.

Since respondent has failed to demonstrate that these standards have been ignored or misapplied by the examiner, we deny the appeal. An appropriate order will be entered.

Commissioner MacIntyre did not participate.

#### ORDER DENYING INTERLOCUTORY APPEAL

This matter is before the Commission upon the interlocutory appeal of respondent. This appeal, filed pursuant to § 3.35(b) of the Commission's rules of practice, is based upon the hearing examiner's order of March 21, 1968, denying respondent's motion to quash complaint counsel's subpoena duces tecum.

For the reasons stated in the accompanying opinion, the Commission has determined that the respondent's appeal should be denied. Accordingly,

*It is ordered*, That the appeal of Lehigh Portland Cement Company from the March 21, 1968, ruling of the hearing examiner on the motion to quash subpoenas duces tecum be, and it hereby is, denied.

By the Commission, with Commissioner MacIntyre not participating.

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#### ALL-STATE INDUSTRIES OF NORTH CAROLINA, INC., ET AL.

*Docket 8738. Supplemental Opinion, Aug. 9, 1968*

A supplemental opinion clarifying an interlocutory order dated November 13, 1967, 72 F.T.C. 1020, as to the Commission's policy in ordering postcomplaint discovery.

## SUPPLEMENTAL CLARIFYING OPINION OF THE COMMISSION

On November 13, 1967 [72 F.T.C. 1020], the Commission issued an order and opinion dealing with an interlocutory procedural matter in this proceeding. In view of questions that appear to have arisen as a result thereof, the Commission deems it appropriate to issue this supplemental clarifying opinion.

In the previous opinion in this case, the Commission stated that its "rules are not intended to provide for comprehensive post-complaint investigation, but only postcomplaint discovery." In making this distinction the Commission did not intend to change the standards which the Rules of Practice establish for dealing with applications for discovery, whether at the instance of complaint counsel or respondents. From the standpoint of avoiding delay in the disposition of adjudicative proceedings, every matter should be adequately investigated before complaint issues. However, we must emphasize that nothing in Section 3.34 nor in any other provision of the Commission's Rules of Practice gives a respondent in an adjudicative proceeding the right to put into litigation the adequacy of the precomplaint investigation conducted by the Commission or its staff. The administrative guidelines laid down by the Commission internally do not confer upon a respondent a legal right—and on the reviewing courts the burden—to police the implementation of the Commission's house-keeping rules in this regard.

Were it otherwise, the hearing examiner, the Commission, and a reviewing court would be confronted with the well-nigh impossible task of determining, not whether the allegations of the complaint are supported by evidence, but whether the precomplaint investigation was proper or sufficient. The proceeding would become converted into a trial of the scope and adequacy of the precomplaint investigation. To introduce such collateral matters into the hearing would invite inexcusable delay.

The Commission's Rules, like the Federal Rules of Civil Procedure, establish objective standards for dealing with discovery matters in the light of the issues raised by the complaint. A discovery request made by complaint counsel is not open to objection on the ground that the materials sought should have been in hand at the time of issuance of the complaint. Such request should be ruled upon without inquiry into whether the materials sought should or could have been obtained in an earlier stage of the proceeding. We emphasize again that the purpose of the discovery provisions of the Rules of Practice is to avoid rather than create opportunities for delay.

## KOPPERS COMPANY, INC.

*Docket 8755. Order and Opinion, Aug. 14, 1968*

Order remanding case to hearing examiner for further consideration of depositions to be taken from six officials of a third party.

## OPINION OF THE COMMISSION

By order and opinion of July 2, 1968 [p. 1571 herein], the Commission remanded to the hearing examiner respondent's application to take depositions of six named officials of United States Pipe and Foundry Company ("U.S. Pipe"). On remand, the examiner on July 9 issued an order, which was modified by a subsequent order of July 18, in which the requested depositions were authorized subject to several conditions that, in the examiner's view, would assure the continuing confidentiality of such information in the hands of U.S. Pipe as should be found to merit this protection. We now have before us another appeal by respondent, in which certain of these procedural safeguards are challenged as improper or impractical. U.S. Pipe has filed a brief as a third party intervenor opposing the appeal.<sup>1</sup> Complaint counsel has also filed a brief in opposition.

As a general rule, the Commission is reluctant to engage in interlocutory consideration of pretrial discovery orders issued by hearing examiners. It has been our experience that the procedures provided by the Commission's Rules of Practice offer practicable and effective discovery mechanisms that depend for their effective administration upon the discretion of the examiner, within proper limits, to fashion orders authorizing discovery on the basis of firsthand consideration of the particular facts and circumstances of each case.

We have recently had occasion to restate our views of the relative functions of the Commission and the hearing examiner in the process of pretrial discovery as it relates to the question of privilege:

The Commission was, and is, loath to substitute its judgment for the examiner's judgment on such matters. This requires, however, that the examiner must actively and independently evaluate all of the countervailing factors in reaching his decision. The examiner, because of his proximity to the case, is, in the first instance, in a far better position to assess the multitude of variables inherent in the delicate balancing of interests between the respondent's need to know sensitive information and the third party's need to protect the same valuable information from his competitor. It is indeed conceivable that, depending on the particular facts, similar specifications

<sup>1</sup> Also before us is respondent's appeal from the examiner's denial of its motion to stay the taking of depositions pending the determination of this appeal.

may require dissimilar treatment in order to insure the most equitable resolution of these conflicting interests. \*\*\*

Neither the Commission nor the courts have given recognition to an absolute trade secret privilege. The revelation of a trade secret will be compelled if it is indispensable to the proceeding. Nevertheless, the Commission and the courts have hesitated to order disclosure absent a clear showing of immediate need for the requested information. Once disclosure is deemed necessary, conditions have usually been imposed which limit the use of the information only to the litigation and which prevent disclosure to \*\*\* competitors.<sup>2</sup>

Questions of necessity on the one hand and the importance of continuing secrecy on the other have been presented and argued before the hearing examiner. The order of July 18, 1968, reflects the examiner's resolution of these competing interests *pro tem*. We will briefly consider the points raised by respondent's appeal.

The examiner's order prohibits inquiry into the "details of U.S. Pipe's manufacturing processes" and inquiry "concerning privileged matters." The latter restriction is a primary tenet of the discovery process, and its inclusion in the order is entirely proper. The former limitation is merely an elaboration or application of the order's central limitation that witnesses may be deposed

only upon such matters, for purposes of discovery, that are alleged in those paragraphs in the complaint in this matter concerning which, by prior designation of counsel supporting complaint, such witnesses will testify at the trial of this matter; or upon matters reasonably related thereto.

Complaint counsel state in their brief in opposition to this appeal that they will not seek to elicit from officials of U.S. Pipe any information relating to manufacturing processes of U.S. Pipe or patent licensing policies of respondent. This being so, the "details" of U.S. Pipe's manufacturing processes do not appear to be necessary for cross-examination or reasonably related to any of the allegations of the complaint. We intend no final determination of the question at this juncture. At this interlocutory stage of the case, our determination is limited to the narrow question whether the examiner's preliminary decision to restrict inquiry into "details" of U.S. Pipe's manufacturing processes is so unreasonable as to constitute an abuse of discretion. On the facts before us, we do not so find.

Respondent challenges the examiner's determination to limit attendance at the taking of depositions to exclude officials of the party respondent and to prohibit any disclosure of testimony

<sup>2</sup> *Lehigh Portland Cement Company*, Docket No. 8680, interlocutory opinion issued August 2, 1968 [p. 1587 herein].

elicited therein without prior notice to U.S. Pipe so that a motion for a protective order could be made.

Regarding attendance at the taking of depositions, respondent's desire to include an official of the party respondent is apparently based on its misapprehension that inquiry into the technical details of U.S. Pipe's manufacturing processes will be permitted, thus requiring the presence of an official of the party respondent to render guidance and assistance in technical matters. Since the order prohibits this line of inquiry, we see no merit in respondent's argument. We are concerned, however, that the non-disclosure provisions of the order may unduly infringe upon the ability of counsel for respondent to prepare his defense. We find no fault with the basic prohibition of disclosure affecting all parties attending the depositions. However, it may be that a more flexible form of order may be devised by the examiner which would allow attorney-client discussions to the extent they are necessary to prepare for and assist in the defense of this action without jeopardizing the secrecy of information elicited from U.S. Pipe or permitting its use for purposes outside the scope of this litigation. See, *e.g.*, *Ames Co. v. Bostich, Inc.*, 235 F. Supp. 856, 857 (1964). Accordingly, we are remanding the matter for further consideration in the light of this opinion.

#### ORDER OF REMAND TO HEARING EXAMINER

Upon consideration of the appeal of respondent from the hearing examiner's ruling of July 18, 1968, and for the reasons stated in the accompanying opinion,

*It is ordered*, That the matter be remanded to the hearing examiner for further consideration.

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#### STAR OFFICE SUPPLY CO. ET AL.

*Docket 8749. Order and Opinions, Sept. 18, 1968*

Order granting complaint counsel's appeal and vacating the hearing examiner's rulings to strike the testimony of witnesses when complaint counsel would not produce investigators' field reports. Interprets *Jencks* doctrine.

#### OPINION OF THE COMMISSION

This matter is before the Commission upon complaint counsel's interlocutory appeal from certain rulings of the hearing examiner, of May 21, 1968, relating to the production of interview reports as to witnesses. On such date the hearing examiner struck the direct testimony of witnesses Walter J. Kroll and Arthur C.

Rochon upon complaint counsel's refusal to release pretrial reports of interviews held with these witnesses. The Commission granted complaint counsel permission to appeal June 28, 1968 [73 F.T.C. 1288]. Complaint counsel filed their interlocutory appeal in the matter July 8, 1968, and respondents filed an answer thereto on July 18, 1968.

The witnesses involved were called by complaint counsel to testify on May 21, 1968. Both had been interviewed previously by Commission investigators and reports as to these interviews were prepared. Mr. Kroll was interviewed by David W. DiNardi, Commission attorney, on October 15, 1965. The report was prepared some weeks later, on November 2, 1965. Arthur C. Rochon was interviewed by Commission attorney John J. McNally (one of counsel herein) on August 4, 1965. The report on Rochon indicates that it was dictated on November 1, 1965. Neither report is signed by the witness. The witnesses had not seen nor approved the reports and, specifically, they had not been shown the reports prior to their testimony to refresh their recollection.

The hearing examiner, at the request of respondents' counsel, ordered the production by complaint counsel of the interview reports with witnesses Kroll and Rochon prior to cross-examination. Complaint counsel, although having previously produced interview reports as to other witnesses, objected to this order of production on the grounds that such reports were not substantially verbatim but were mere summaries and that they had not been shown to or approved by the witnesses. The hearing examiner received these interview reports and ordered that they be made available to respondents' counsel, with certain paragraphs deleted.<sup>1</sup> When complaint counsel refused to release the reports, he granted motions to strike the testimony of the witnesses. The examiner indicated that if interview reports of further witnesses were of like import he would order that these also be turned over to respondents' counsel.

The examiner seemed to wholly ignore the prior rulings of the Commission on the subject of production of pretrial interview reports with witnesses. He indicates the view that interview reports generally should be produced by complaint counsel. While he queried the investigators who had conducted the interviews on the issue of whether or not they attempted to accurately report what the witness had said, he made no attempt, so far as the record discloses, to determine whether these reports contained the

<sup>1</sup> On the Kroll report he excepted from production the third and fourth paragraphs on page 2 (tr. 745), and in the Rochon report he excepted from production the first two paragraphs (tr. 789).



witnesses' own statements as defined by the applicable law. His holding, rather, seemed to be on the general ground of his determination that production was necessary in "fairness" to respondent and his conclusion that the reports contain no confidential material.<sup>2</sup>

The Commission has set down detailed instructions on the question of the production of interview reports in such prior cases as *Inter-State Builders, Inc.*, Docket No. 8624 (order issued April 22, 1966) [69 F.T.C. 1152], and *L. G. Balfour Company*, Docket No. 8435 (order issued April 22, 1966) [69 F.T.C. 1118]. These cases hold that interview reports are not to be released for inspection where the witness interviewed has testified on direct unless such reports satisfy the requirements of the so-called Jencks Act for the production of witnesses' prior statements (18 U.S.C. § 3500 (1958)). Under Section (e) of such Act, a statement subject to production is defined to mean

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a *substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.*" (Emphasis supplied.)

In this case, since the interview reports in question were not signed or otherwise adopted or approved by the witnesses, the issue turns on whether these can be construed to be substantially verbatim recitals of the oral statements of the witnesses recorded contemporaneously. In *Inter-State Builders, supra*, we held that "summaries" of witnesses' statements made by an attorney or investigator should not be produced. In the *Balfour* case, *supra*, we ruled that interview reports in the Commission's files "ordinarily are agents' summarizations" and that "the examiner, if he orders an interview report produced, has the obligation of making concrete findings that the prerequisites of Section (e) of the Jencks Act have been met." Nowhere in the examiner's statements is there a clear indication that he applied the Jencks Act standard.

<sup>2</sup> Some of the hearing examiner's statements on the subject follow:

"Well, as I stated before, I believe this information in fairness to Respondent ought to be turned over to Respondent's counsel . . ." (Tr. 793.)

"Of course I believe the matter is not in the interest of the Commission nor in the interest of the Respondent or in the interest of the public to refuse to turn over these reports, because as far as the hearing examiner can see it, there is nothing in there that should be confidential, and I don't think it would materially affect the situation, but I would not require the Respondent to proceed to cross-examine the witnesses without the opportunity to examine these reports before he does cross-examine the witness. . . ." (Tr. 794.)

The examiner asserted the production was necessary in "fairness" to the respondents but the fact is that, to the contrary, it may be highly unfair to subject a witness to cross-examination on the basis of summaries by a third-party investigator of what the witness was supposed to have said. The Supreme Court of the United States, in *Palermo v. United States*, 360 U.S. 343, 350 (1959), in relating the motivating forces behind the enactment of the Jencks Act, stated that there was, among other things, the feeling it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations."

We conclude, therefore, that the examiner improperly struck the direct testimony of witnesses Kroll and Rochon without first having expressly determined whether or not the interview reports in question were the witnesses' own statements falling within the terms of the Jencks Act. The examiner is instructed to follow the Commission's pertinent rulings on the production of interview reports not only as to the reports on witnesses Kroll and Rochon but also as to any interview reports relating to witnesses subsequently called in this proceeding. We will grant the complaint counsel's appeal, vacate the examiner's rulings striking the witnesses' testimony and return the case to the hearing examiner for further proceedings in accordance with the Commission's views expressed herein. An appropriate order will be issued to accompany this opinion.

DISSENTING OPINION  
SEPTEMBER 18, 1968

By ELMAN, *Commissioner*:

The Commission again applies in this case what I regard as an erroneous and unfair test for determining the producibility of an interview report: not whether it accurately and reliably records the substance of a witness' statements but whether it is a "substantially verbatim," "contemporaneously recorded" transcription of the witness' "own words." My views are detailed in the two dissenting opinions filed in *Inter-State Builders, Inc.*, Docket No. 8624, April 22, 1966 [69 F.T.C. 1152] and July 28, 1967 [72 F.T.C. 370, 407]. As I there predicted, the Commission's opinions in these cases "in practical effect will serve as a manual on how to write interview reports so as to guarantee not having to produce them." F.T.C. interview reports "ordinarily are agent's summarizations." They are not usually cast in the form of

'substantially verbatim,' 'contemporaneously recorded' transcriptions of witnesses' oral statements. And it is safe to presume that, after today's rulings by the Commission, interview reports are not likely to be cast in that form in the future."

Conspicuous by its absence has been any direction by the Commission to its staff attorneys to draft interview reports in such a form that they will be producible, even under the majority's test. It is just as easy for an investigator to prepare an interview report, not as a "mere summary," but as a "substantially verbatim," "contemporaneously recorded" transcription of the witness' "own words." It should not make any difference whether the interview is conducted at an early or advanced stage of the investigation, or whether it is held in the field or in Washington. Whatever the circumstances, the only function of an interview report is to record, faithfully and objectively, the statements made by the witness. Of course, the Commission attorney should add his own subjective comments and evaluation, but this can and should be done in a separate memorandum which should remain confidential. The only reason which I can see for interspersing such comments and evaluation in an interview report is to make it unproducible under the majority's view of the *Jencks* rule.

Despite all its rationalizations, the Commission is quite content to allow its attorneys to continue drafting interview reports in such a form that they will not be producible. The result, as I stated in *Inter-State Builders*, is that the *Jencks* rule is a dead letter as applied to F.T.C. interview reports. The Commission and its staff use and rely upon interview reports; but, no matter how accurate and reliable they may be in recording a witness' statements, they are not available to a respondent for use in cross-examination. This seems to reflect a singular indifference to considerations of fairness and justice, not to mention the spirit of the Freedom of Information Act.

CONCURRING OPINION

SEPTEMBER 18, 1968

BY MACINTYRE, *Commissioner*:

The decision of the majority is amply supported by acts of Congress and the decisions of this Commission and the courts. So is the position of the majority in applying the test of whether an interview report is a substantially verbatim and contemporaneously recorded transcription of the witness' own words as the basis for determining its producibility.

Now the further question has arisen as to whether it is unfair if the Commission should fail to direct its investigators "to draft interview reports in such form that they will be producible, even under the majority's test." For those of us who know the dangers inherent in such an idea and are otherwise informed sufficiently to render proper judgment, we reject such idea and the question, therefore, answers itself. However, for the less informed, perhaps it would be of some benefit to explain that it would be farfetched to require that all interview reports of investigators be made in such form as to be producible on the request of any interested party. This would be true whether the investigators be employees of the local, state or Federal government, and if employees of the Federal government, irrespective of whether they be FBI agents or investigators for the Internal Revenue Service or the Federal Trade Commission. I say that because many of these investigators conduct some interviews only for the purpose of getting leads to persons who may have some information and who may be appropriate as witnesses in proceedings. The persons to whom resort is made for such leads would in some instances not be regarded as appropriate subjects for witnesses. Should such persons who, although knowing nothing about the facts in the proposed proceeding, do nevertheless supply investigators with names of possible witnesses who are believed to know something about the facts, be exposed to the world through records made by investigators? As matters stand at this time, it has been concluded and so ruled by the Congress, the courts and this Commission, that public policy would not be served by such exposure. The teaching of the decision of the majority and the test the majority would apply conforms to that declared public policy.

CONCURRING OPINION  
SEPTEMBER 18, 1968

BY NICHOLSON, *Commissioner*:

As pointed out by Commissioner MacIntyre in his concurring opinion, it would be unrealistic to expect or require field attorneys conducting an investigation pursuant to direction of the Federal Trade Commission to prepare substantially verbatim summaries of interviews conducted in such investigations, or even, in most instances, to request an interviewee to ratify any synopsis prepared by the investigating attorney. The reason should seem obvious: At this stage in the proceedings, the investigating attorney is concerned with only one thing; the investigation of a possible violation of the laws enforced by the Federal Trade Com-

mission. In most instances the attorney will not know at that stage whether a complaint will be issued, or even recommended, and certainly will have reached no conclusion as to whether the particular interviewee will or will not be called as a witness.

Formalizing this stage of the investigation would likely inhibit the cooperation of the witness who may have direct knowledge of violation or who may serve only as a lead to other sources of evidence which might be used.

Commissioner MacIntyre fails to point out that the investigation interview should be distinguished from later interviews by a trial counsel. After a complaint has been issued, he is preparing his case for trial with the plan of calling the interviewee as a witness. In this situation the witness should surely be aware that the detailed statement by the trial attorney will be used for purposes of refreshing the witness' recollection at the hearing and should be asked to review any summary or substantially verbatim record which the trial attorney prepares.

In this latter instance the interview reports should not be interspersed with the conclusions and opinions of the trial attorney. Any such observations should be made by the trial attorney in a separate memorandum. Therefore, statements thus prepared by the trial attorney should be made available to respondent's counsel, to comply with the letter and the spirit of the Jencks Act, the *Jencks* decision and the Freedom of Information Act.

#### ORDER RULING ON INTERLOCTORY APPEAL

This matter is before the Commission upon complaint counsel's interlocutory appeal, filed July 8, 1968, from the hearing examiner's rulings of May 21, 1968, striking the direct testimony of two witnesses called by complaint counsel, and upon respondents' answer thereto filed July 18, 1968; and

The Commission, for the reasons appearing in the accompanying opinion, having determined that the appeal should be granted, the examiner's rulings striking the witnesses' testimony vacated and the matter returned to the hearing examiner for a continuation of the proceeding in accordance with the views of the Commission expressed in its opinion:

*It is ordered*, That the interlocutory appeal of complaint counsel be, and it hereby is, granted.

*It is further ordered*, That the examiner's rulings of May 21, 1968, striking the testimony of witnesses Kroll and Rochon, be, and they hereby are, vacated.

*It is further ordered*, That the hearing examiner continue this

proceeding in accordance with the views expressed in the Commission's accompanying opinion.

Commissioner Elman dissenting and has filed a statement.

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### SUBURBAN PROPANE GAS CORPORATION

*Docket 8672. Order and Opinions, Sept. 20, 1968*

Order denying respondent's appeal from hearing examiner's denial of respondent's motion to subpoena certain disfavored customers and to limit or quash other subpoenas relating to proof of cost justification.

#### OPINION OF THE COMMISSION

This matter is before the Commission upon respondent's interlocutory appeal, filed August 23, 1968, from portions of the hearing examiner's order filed July 19, 1968, which, *inter alia*, schedules the hearing in this proceeding to commence October 7, 1968, and otherwise rules on prehearing issues before the examiner. Complaint counsel, on August 30, 1968, filed an answer opposing respondent's appeal. Phillips Petroleum Company, the subject of certain subpoenas in contention, filed on September 12, 1968 a brief commenting on respondent's appeal.

In addition to the interlocutory appeal, respondent has filed two separate requests for permission to file interlocutory appeal from other orders of the examiner. The first, filed August 30, 1968, is a request for leave to file an appeal from the denial of Suburban's application for issuance of subpoenas duces tecum to thirteen alleged disfavored competitors of Suburban that had been noticed as witnesses for complaint counsel in this proceeding. Complaint counsel, on September 4, 1968, filed a brief opposing such request. Respondent filed a further petition for leave to file an interlocutory appeal on September 10, 1968. This last request is for permission to appeal from the hearing examiner's order dated August 30, 1968, extending the time for Phillips Petroleum Company to move to quash or limit a subpoena duces tecum served upon it on June 27, 1968, at the instance of Suburban, to and including September 16, 1968.

Respondent, in its interlocutory appeal filed August 23, 1968, challenges certain portions of the hearing examiner's order of July 19, 1968, as follows: that part which orders the commencement of the formal hearing on October 7, 1968; that part which continues the motion of Phillips Petroleum Company to limit the subpoena duces tecum served upon it on March 10, 1967, to October 28, 1968, and ordering Phillips to continue to respond to

the subpoena in a manner previously agreed to by counsel; that part which denies Suburban's motion to shorten the time within which Phillips Petroleum Company may move to quash or limit the subpoena duces tecum served on it on June 27, 1968 (now set for September 30, 1968); and, finally, that part which denies Suburban's motion to defer cross-examination of complaint counsel's witnesses at the hearing scheduled for October 7, 1968.

The points which respondent raises on its interlocutory appeal, as well as the issues contained in its separate requests for permission to file interlocutory appeal, all concern the hearing examiner's prehearing rulings relating to discovery and discovery procedures. The Commission's policy in such matters, frequently stated in Commission opinions, is that the hearing examiner has a broad discretion therein and the Commission will not interfere with his rulings short of a showing of an abuse of such discretion.<sup>1</sup>

Respondent's first contention is that the examiner's order, by setting the hearing to commence on October 7, 1968, deprives it of "effective" cross-examination. It argues that the hearing will occur in the absence of the production of Phillips Petroleum Company's documents relating to the issues of cost justification and other material and the files of alleged disfavored competitor witnesses (on this latter item respondent, as above indicated, on August 20, 1968 filed a separate request for permission to file an appeal from the examiner's denial of its request for subpoenas to such witnesses). Thus, respondent claims it will be obliged to proceed to hearing without benefit of adequate discovery relating to critical issues in the case. In this connection we refer to the hearing examiner's order of August 15, 1968. In this order the hearing examiner asserts that respondent, under a broad discovery subpoena duces tecum served March 10, 1968, on Phillips Petroleum Company, has had substantial discovery from that company and that such discovery is continuing. In addition to this, the hearing examiner recites the extent of the opportunity, seemingly considerable, which respondent has had in the approximately three years since the issuance of the complaint herein to prepare itself for its defense in this proceeding. More explicitly, respondent has had complaint counsel's brief since September 30, 1966, which sets forth the substance of the testimony of complaint counsel's witnesses. In addition, the hearing examiner asserts that after complaint counsel have completed their case-in-

<sup>1</sup> *Associated Merchandising Corporation*, Docket No. 8651 (order issued November 13, 1967) [72 F.T.C. 1015] and cases cited therein; *The Seeburg Corporation*, Docket No. 8682 (order issued October 25, 1966) [70 F.T.C. 1809].

chief, respondent will be afforded a reasonable time consonant with the Commission's rules to prepare its defense. Thus, we do not believe that the hearing examiner has abused his discretion in thus setting the date on which the trial herein is to commence on October 7, 1968. Nor do we believe a showing has been made that respondent's opportunity for discovery has been inadequate in the circumstances of this case.

Respondent, in its second point, asserts that the hearing examiner's order offends due process in that such order applies Commission Rule 3.41 (b) retroactively, and, in its third point, that if such new rule is applicable the hearing examiner has failed to justify its use in this proceeding. The respondent, under these two points, appears to be challenging the hearing examiner's comments or a ruling to the effect that he would provide an interval at the end of complaint counsel's case-in-chief to permit respondent further time to prepare its defense. The order of July 19, 1968, from which the appeal is made, contains no such statement by the examiner. However, the examiner, in his later order of August 15, 1968, includes the comment that he would provide an appropriate interval.

Under the Commission's rule in effect at the time the complaint herein was issued (Section 3.16(d) of the Commission's rules effective August 1, 1963), all hearings were to be held at one place and continue without suspension until concluded, unless the Commission otherwise ordered upon a certificate of necessity. The Commission's current rule permits the hearing examiner, in unusual and exceptional circumstances and for good cause stated on the record, to order hearings at more than one place and "to order brief intervals to permit discovery necessarily deferred during the prehearing procedures" (Section 3.41(b)). Respondent's contention is that the hearing examiner has improperly applied the new rule, to respondent's prejudice, and that even if the new rule does apply the hearing examiner has failed to make a showing of unusual and exceptional circumstances to justify its use.

The hearing examiner has not referred explicitly to Commission Rule 3.41(b) of the Commission's current rules either in his order of July 19, 1968, or his later order of August 15, 1968. No reference is made by the respondent to any part of the record in which the examiner has expressly stated he would follow the new rule, Section 3.41(b). It might be that the examiner, in his statement in the order of August 15, 1968, that he would afford a reasonable time after complaint counsel's completion of their case for respondent to prepare its defense, is therein referring to his



authority under the new rule. This is by no means clear. It is possible that he could so provide even under the old rules by certification to the Commission. In the circumstances we believe it is premature to challenge the hearing examiner on an action which he has not yet taken. The examiner stated in this regard that his order would be in conformity with the Commission's rules. No showing has been made either that he would apply the wrong rules or apply the rules incorrectly. Moreover, we do not believe the respondent has made a showing that it would be prejudiced in any way by the new rule if such were applied by the examiner. In fact, this would seem to be to respondent's advantage.

Finally, respondent argues, in its fourth point, that the order of the hearing examiner assertedly relieving Phillips of its obligation to comply with the subpoenas duces tecum served upon it denies respondent a fair hearing. The reference in this connection is to a subpoena served on Phillips Petroleum Company March 10, 1967, on which the examiner continued Phillips' motion to limit to October 28, 1968, although providing for continuing production by Phillips, and the subpoena served on Phillips on June 27, 1968, relating to cost justification, on which the time for production apparently has been set to take place at an early date. We note, as indicated previously, that the hearing examiner states substantial discovery has been had under the first subpoena and that it is continuing. Furthermore, the statement filed by Phillips Petroleum Company in this appeal indicates that considerable information and materials have been supplied or made available. Production under the second subpoena has been scheduled. It does not appear likely that this production will be completed before the hearing date on October 7, 1968. Respondent, however, has failed to show it will be prejudiced by such delay in obtaining this particular material, if this does happen. Accordingly, we believe that respondent's objections are premature and that no sufficient showing has been made that respondent has been foreclosed from adequate discovery from Phillips.

In summary, it appears that the respondent's appeal and its separate requests for permission to file other appeals all concern issues relating to procedural details, that is, the scheduling of hearings or the setting of dates for compliance with subpoenas, the issuance of subpoenas, actions on motions to limit or quash subpoenas and like matters. Some of the issues are premature in that the examiner has not finally ruled in the matter or in that respondent is not able to show an exhaustion of opportunities for satisfaction of its requests. The questions all concern prehear-

ing discovery or procedure and thus are subject to the wide discretion of the hearing examiner in such matters. We do not believe that a showing has been made that the hearing examiner has abused his discretion or otherwise that the circumstances are so unusual or exceptional that the Commission should overrule the hearing examiner. Moreover, we do not believe that the respondent has made any showing that it has been prejudiced or that it will, under the circumstances, fail to receive a fair hearing. There has been no showing as far as the requests for permission to appeal are concerned that the rulings complained of involve substantial rights and will materially affect the final decision, and that a determination of their correctness before conclusion of the hearing is essential to serve the interests of justice. Accordingly, we will deny respondent's appeal and its requests for permission to file interlocutory appeals in two separate instances. An appropriate order will be entered.

Commissioner Elman dissented and filed a statement.

DISSENTING OPINION  
SEPTEMBER 20, 1968

BY ELMAN, *Commissioner*:

If, as I have previously stated in this case, it was error for the Commission to shift to respondent the heavy burden of proving that the prices it was charged were cost justified, that error is compounded by the instant order which denies respondent a reasonable opportunity to prepare its defense.

ORDER DENYING INTERLOCUTORY APPEAL AND  
REQUESTS FOR PERMISSION TO APPEAL

Upon consideration of respondent's interlocutory appeal, filed August 23, 1968, from the hearing examiner's order of July 19, 1968, and its requests filed on August 30, 1968, and on September 10, 1968, for permission to file interlocutory appeals from other orders of the hearing examiner, the Commission, for the reasons appearing in the accompanying opinion, has determined that the appeal and the requests should be denied. Accordingly,

*It is ordered*, That respondent's interlocutory appeal, filed August 23, 1968, from the hearing examiner's order of July 19, 1968, be, and it hereby is, denied.

*It is further ordered*, That respondent's request filed August 30, 1968, for permission to appeal from the examiner's denial of its application for the issuance of subpoenas duces tecum to alleged disfavored customers, and its request filed September 10,

1968, for leave to file an appeal from the examiner's order extending the time for Phillips Petroleum Company to move to quash or limit a subpoena be, and they hereby are, denied.

Commissioner Elman dissented and has filed a statement.

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LAKELAND NURSERIES SALES CORP. FORMERLY  
KNOWN AS LAKELAND-DEERING NURSERIES SALES  
ET AL.

*Docket 6666. Order, Sept. 23, 1968*

Order denying respondents' petition to set aside a consent order of June 25, 1957, 53 F.T.C. 1189, on ground of changed conditions of fact.

ORDER DENYING PETITION TO SET ASIDE ORDER  
TO CEASE AND DESIST

Respondents, by petition filed pursuant to Rule 3.72(b) (2) on August 14, 1968, request that the Commission set aside the consent order to cease and desist entered herein on June 25, 1957 (53 F.T.C. 1189-91), on the ground that changed conditions of fact require such action.

The specific changes of fact principally underlying respondents' motion are that (1) the individual respondents Lillian Zogheb and Allan Lekus have not been officers or directors of the corporate respondent for approximately the last ten years; (2) the corporate respondent, on July 1, 1968, sold all of its interest in the nursery business theretofore conducted by it and, having changed its name to H.C. Nurseries Sales Corp., exists only to facilitate liquidation of the corporation; (3) both the corporate and the remaining individual respondents, Henry L. Hoffman and Chester Carity, as well as the corporation's other officer, have entered into covenants with the purchaser of the nursery business not to engage in any manner or degree in the nursery business for a period of five years from July 1, 1968, and respondents Hoffman and Carity, individually and on behalf of the corporation, are not now engaged in the nursery business and have no present intention of re-entering the nursery business during the five-year term of the above-described restrictive covenant or at anytime thereafter.

The Commission is of the opinion that the foregoing averments, assuming their accuracy, do not provide a sufficient guarantee that none of the respondents will ever enter the nursery business. Moreover, while respondents are not engaged in the nursery business, the order will impose no burden on any party, and should a respondent or respondents, contrary to present intention, re-

enter the nursery business at some future date, then the order would continue to protect the public interest against the deception to which it is directed.

Accordingly, the Commission having carefully considered the petition and the answer thereto and being of the opinion that the allegations in respondents' motion do not provide sufficient grounds to support the conclusion that conditions of fact have so changed since the issuance of the order to cease and desist as to require the setting aside of said order or that the public interest may now require such action:

*It is ordered,* That respondents' petition be, and it here is, denied.

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### SUBURBAN PROPANE GAS CORPORATION

*Docket 8672. Order and Opinion, Sept. 23, 1968*

Order denying respondent's motion to withdraw proceeding from adjudication for the purpose of considering voluntary compliance.

#### DISSENTING OPINION SEPTEMBER 23, 1968

BY ELMAN, *Commissioner*:

I would accept respondent's assurance of voluntary compliance and terminate this proceeding.

This case arose out of an investigation begun almost a decade ago and involves transactions dating to 1957. The complaint alleges that respondent, a purchaser of liquefied petroleum gas (LP gas), violated Section 2(f) of the Clayton Act, as amended, by knowingly inducing and receiving price concessions from Phillips Petroleum Company that were not available to respondent's competitors. Respondent, in a formal affidavit signed by its president, now promises that it will not again engage in this practice.

There are numerous reasons for crediting this promise and accepting the assurance. Respondent has severed its long-term contract with Phillips, and the latter has largely withdrawn from the Northeast market where the alleged violations occurred. There is also reason to believe that sellers of LP gas are now at a bargaining advantage vis-a-vis buyers like respondent, making it difficult if not impossible for buyers to induce unlawful price concessions.

While compliance with the assurance is therefore likely, other factors also weigh in favor of its acceptance. Most important is that rejection of the assurance will prolong this proceeding at least

into the 1970's, and quite possibly for another decade, with the very real possibility that at the end of that time no order will be entered. This proceeding has already been tainted, in my view, by the Commission's erroneous allocation of the burden of proof, shifting to respondent the heavy burden and considerable expense of proving cost justification in disregard of the Supreme Court's decision in *Automatic Canteen Co. v. Federal Trade Commission*.<sup>1</sup> Should respondent's position on this question ultimately be vindicated, a not unlikely result, this costly litigation, which is now almost three years old with respondent having barely begun to exercise its right to discovery, will have served no useful purpose. At a time when the Commission should be tightening its belt and allocating its limited resources on the basis of a clearly perceived, rational set of priorities, rejection of this assurance seems to make little sense.

ORDER DENYING RESPONDENT'S MOTION TO WITHDRAW  
PROCEEDING FROM ADJUDICATION

This matter is before the Commission upon the hearing examiner's certification, without recommendation, filed August 26, 1968, of respondent's motion to withdraw this matter from adjudication for the purpose of considering its "assurance of voluntary compliance" filed August 23, 1968. Complaint counsel filed directly with the Commission, on August 29, 1968, a brief in opposition to respondent's motion.

The Commission has determined that Section 2.21 of its Rules of Practice, pursuant to which respondent has requested consideration of its motion, does not provide for disposition of a matter by the submission of an assurance of voluntary compliance subsequent to the issuance of the complaint. Section 2.21 is limited to the disposition of matters which have not yet reached the adjudicative stage. For this reason respondent's motion for withdrawal will be denied. If the provisions of the proposed assurance of voluntary compliance were contained in a proposed consent order, they would constitute the requisite predicate for the Commission's granting of a motion under section 2.34(d). Nevertheless, respondent has brought its motion under section 2.21, and has not made a sufficient showing to justify the form of relief requested in this motion. Accordingly,

*It is ordered,* That respondent's motion for an order withdrawing this proceeding from adjudication on the basis of its

<sup>1</sup> 346 U. S. 61 (1953); see *Suburban Propane Gas Corp.*, Docket No. 8672 (June 3, 1968) [73 F.T.C. 1269].

assurance of voluntary compliance be, and it hereby is, denied.  
Commissioner Elman dissented and has filed a statement.

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S.S.S. COMPANY

*Docket 8646. Order, Sept. 26, 1968*

Order denying motion by respondent to stay the filing of compliance report.

ORDER DENYING MOTION TO STAY FILING OF COMPLIANCE REPORT

Upon consideration of the motion filed on September 17, 1968, by respondents to stay the filing of a compliance report pending final judicial determination of the validity of the order entered by the Commission in this proceeding, and

It appearing that the motion is based on the mistaken premise that Section 3.61(a) of the Commission's Rules of Practice does not operate to effect such a stay, and

It further appearing that Section 3.61(a), which implements Section 5(g) of the Federal Trade Commission Act, 15 U.S.C. § 45(g), by its terms suspends the time for filing a report of compliance "when court review of an order of the Commission is pending" and provides:

Thereafter, the time for filing report of compliance shall begin to run de novo from the final judicial determination, except that if no petition for certiorari has been filed following affirmance of the order of the Commission by a court of appeals, the compliance report shall be due the day following the date on which the time expires for the filing of such petition.

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

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SUBURBAN PROPANE GAS CORPORATION

*Docket 8672. Order and Opinion, Oct. 3, 1968*

Order granting respondent leave to file response to comments filed by Phillips Petroleum Company (involving extension of time to respond to subpoena for cost justification documents) and denying respondent's request and Phillips Petroleum Company's request to file interlocutory appeals.

ORDER AND OPINION RECEIVING RESPONSE INTO RECORD AND  
DENYING REQUESTS FOR INTERLOCTORY APPEAL

This matter is before the Commission upon the motion of respondent, filed September 19, 1968, requesting leave to submit a

response to comments filed by Phillips Petroleum Company herein, or for alternative relief, and upon respondent's request for leave to file an interlocutory appeal, filed September 23, 1968, from the hearing examiner's order dated September 13, 1968, extending the time within which Phillips Petroleum Company has to move to quash or limit the subpoena duces tecum served upon it June 27, 1968, and extending the time within which it may comply therewith. This matter is also before the Commission on a request by Phillips Petroleum Company, filed September 25, 1968, to file an interlocutory appeal from the same order of the examiner of September 13, 1968.

Respondent's motion of September 19, 1968, concerns the comments filed by Phillips Petroleum Company with respect to respondent's interlocutory appeal from the hearing examiner's order of July 19, 1968. Phillips Petroleum Company filed its comments pursuant to permission granted by the Commission in its order of August 8, 1968. The Commission, on September 13, 1968, denied a request by the respondent to file a reply to Phillips Petroleum Company's comments. Respondent now seeks the following relief: it requests an order granting it leave to file a response to Phillips Petroleum Company's comments, a copy of which it has attached to its request, or, in the alternative, leave to reargue its cross-motion, filed September 12, 1968, for permission to submit a reply; and upon such reargument, to permit the attached response to be filed.

The Commission has determined, in the circumstances and considering that respondent has attached to its motion its response to Phillips Petroleum's comments, such response should be received into the record. The Commission, however, has already ruled upon respondent's interlocutory appeal filed August 23, 1968, and its order and opinion therein were issued on September 20, 1968 [p. 1602 herein]. Our consideration of respondent's response will be to determine if anything therein might alter the Commission's views as expressed in its order and opinion issued September 20, 1968.

Respondent's first point in its response is that the hearing examiner failed to follow the direction of the Commission as set forth in *Texas Industries, Inc.*, Docket No. 8656 (order issued October 8, 1965) [68 F.T.C. 1195], and that the examiner presently has before him all of the materials necessary to narrow the issues and rule upon Suburban's asserted rights to discovery from Phillips Petroleum Company and other parties. It is claimed that Phillips Petroleum Company embraces a view calling for delay in

compliance with respondent's discovery requests. The Commission, in its opinion and order, made no ruling one way or the other on the proper times for production under subpoenas or for other responses. These were determined to be matters for the examiner's discretion. Our view on this is not changed.

In its second point Suburban argues that Phillips Petroleum Company suggests it has been unreasonable in the drafting of its subpoenas and other related actions, and it submits that this is unjustified. Such an argument seems to present an issue which was not involved in the Commission's prior determination. In its third point respondent contends that Phillips Petroleum Company suggests that Suburban will not succeed in establishing facts as to a cost-justification defense and it submits that it is entitled to the facts to prove such a defense. The question, so far as Phillips Petroleum Company allegedly suggests—whether respondent may or may not succeed in establishing facts as to its defense—likewise concerns an issue which was not before the Commission. Respondent's assertion as to its rights is a reargument of points it previously made to the Commission. We do not believe that these arguments present adequate grounds for revising our views.

Finally, respondent argues that the hearing examiner has abrogated his responsibility by his rulings on the two Phillips subpoenas and denying respondent's application for subpoenas to alleged disfavored competitors and in other respects. Such point in the response seems not to be connected with the comments made by Phillips. Accordingly, no further consideration will be given to it.

In summary, we will hereby receive respondent's response to the comments filed by Phillips Petroleum Company into the record. We have considered respondent's arguments in its response and it is our holding that nothing therein changes our views as set forth in our order and opinion denying interlocutory appeal and requests for permission to appeal, issued September 20, 1968, in which we sustained the hearing examiner in challenged pre-hearing discovery and procedural rulings. Respondent is not prejudiced from presenting its arguments to the hearing examiner for his further consideration in the matter.

Respondent, as above indicated, has also filed a request for leave to file an interlocutory appeal from the examiner's order dated September 13, 1968.<sup>1</sup> This order extends the time within

<sup>1</sup> While it is of little significance in the circumstances here, it seems that the examiner's order from which both respondent and Phillips Petroleum Company have requested permission to file appeals sufficiently concerns a subpoena matter to come within the provisions of § 8.35 (b)



which Phillips Petroleum Company may move to quash or limit the subpoena duces tecum served upon it on June 27, 1968, to fifteen business days after the Commission has disposed of the matters on appeal and extends the time within which Phillips Petroleum Company may comply with the subpoena to sixty days after the Commission disposes of such matters. Respondent asserts that this order prejudices it in deferring once more the time for Phillips to move with respect to, or comply with, the cost-justification subpoena. We believe that any issue raised by this request has been covered in the Commission's recent order and opinion issued herein on September 20, 1968 [p. 1602 herein]. No showing has been made that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before the completion of the hearing is essential to serve the interests of justice.

Phillips Petroleum Company also has applied for leave to file an interlocutory appeal from the hearing examiner's order of September 13, 1968, claiming, among other things, that it is not certain whether the order was issued with or without prejudice to its right to reapply for the relief requested in its motion filed September 12, 1968, and if it is with prejudice it seeks a reversal; otherwise, a clarification. Phillips Petroleum Company's request borders on the frivolous. If it did not understand the order, it should have sought clarification from the hearing examiner who issued the order and who, furthermore, is responsible for the proceeding. Its request will be denied. Accordingly,

*It is ordered,* That respondent's motion for leave to submit a response to comments filed by Phillips Petroleum Company, which response is attached to its motion, be, and it hereby is, granted.

*It is further ordered,* That respondent's response filed September 19, 1968, be, and it hereby is, received into the record.

*It is further ordered,* That respondent's request filed September 23, 1968 for leave to file an interlocutory appeal from the hearing examiner's order dated September 13, 1968, be, and it hereby is, denied.

*It is further ordered,* That the request of Phillips Petroleum Company, filed September 25, 1968, for permission to file an interlocutory appeal be, and it hereby is, denied.

Commissioner Elman not participating.

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of the Commission's rules dealing with appeals on rulings relating to applications for compulsory process rather than § 3.23 covering interlocutory appeals, under which the two have proceeded.

## MAREMONT CORPORATION

*Docket 8763. Order and Opinion, Oct. 3, 1968*

Order denying respondent's request to file an appeal from hearing examiner's denial of its motion to dismiss proceeding on grounds that Commission is currently conducting an industry-wide survey of the automotive parts industry.

## OPINION OF THE COMMISSION

This matter is before the Commission upon respondent's request, filed September 11, 1968, for permission to file an interlocutory appeal from that part of the hearing examiner's order of August 26, 1968, denying its motion to dismiss the complaint or stay the proceeding. Complaint counsel filed a statement on September 17, 1968, opposing the request. Respondent, on September 23, 1968, filed a reply memorandum.

Respondent, on August 19, 1968, filed a motion, accompanied by a supporting memorandum, with the hearing examiner, requesting (a) that the complaint be dismissed or (b), in the alternative, that all proceedings be stayed until further direction of the Commission upon completion of an investigation into the acts and practices of companies manufacturing automotive parts, accessories and equipment pursuant to its resolution of May 14, 1968, and "the formulation of an appropriate Trade Regulation Rule or other objective standards of general applicability." The respondent, further in the alternative, requested the examiner to certify its motion to the Commission pursuant to § 3.22(a) and § 3.42(c) (9) of the Commission's rules if he concluded that the relief sought, as outlined above, was beyond his authority to grant. Complaint counsel, on August 21, 1968, filed a response opposing respondent's request. The hearing examiner, in his order dated August 26, 1968, denied respondent's motion in the respects here in controversy.<sup>1</sup>

Respondent argues first that the examiner erred in ruling on the motion, which it asserts to be beyond his jurisdiction, and, secondly, that its request is justified on the merits. We agree that the hearing examiner erroneously ruled on the request to dismiss the complaint or stay the proceeding. The motion clearly is addressed to the Commission's administrative discretion and does not concern adjudicative factfinding functions delegated to hearing examiners. *Graber Manufacturing Company, Inc.*, Docket No. 8038 (order issued October 15, 1964) [66 F.T.C. 1548]. The hearing examiner should properly have certified this part of re-

<sup>1</sup> Respondent, in its motion, also asked for an extension of time within which to answer. The hearing examiner, in his August 26, 1968, order, extended such time to September 11, 1968.

spondent's motion to the Commission for the Commission's determination and action. Nevertheless, in view of respondent's application for permission to file an interlocutory appeal, the matter is now before the Commission in the same posture as it would have been had the examiner certified it. Accordingly, while our holding is that the hearing examiner erred in failing to certify the motion, this in the circumstances was not to respondent's prejudice, and the motion will now be treated as though it had been properly certified. Since we are treating this as a certification, it is respondent's motion that, in effect, is before us, although our consideration will include respondent's request for permission to appeal.

The hearing examiner, in ruling on respondent's motion, construed its essence as follows:

The basis of respondent's motion is, essentially, that (1) the Commission, having initiated an investigation of the automotive parts industry in May 1968, for the purpose of determining whether acquisitions made therein may be illegal, it was an arbitrary abuse of its discretion to issue a complaint against respondent in July 1968, without proceeding against other more important competitors, and (2) the problems of the industry, including the matter of acquisitions, can be dealt with more effectively through the issuance of a rule of general applicability. . . .

Respondent appears to agree that these are the issues presented. On page 2 of its request it observes that the basic grounds of its motion were (1) the proceeding against respondent is discriminatory and (2) the matter should be dealt with on an industry-wide basis.

Concerning the first point, it is clear that the Commission has a wide and essential discretion on the question of proceeding against an individual respondent. *Moog Industries v. Federal Trade Commission*, 355 U.S. 411 (1958); *Federal Trade Commission v. Universal Rundle Corp.*, 387 U.S. 244 (1967). Beyond that respondent has failed to show that the Commission has abused its discretion. If it is assumed, as respondent asserts, that one or more competitors of respondent engaged in actions similar to those which form the basis of the complaint against the respondent—that is, acquisitions of other concerns—this alone would not mean that the Commission has been unfair and discriminatory in issuing a complaint against respondent and not the others. Not every acquisition violates statutes administered by the Commission. Under Section 7 of the amended Clayton Act, for instance, there must be, among other things, a showing that the merger might substantially lessen competition. Thus, each case must be looked at on its own individual facts.

Even where there is more than one alleged violator among competitors the circumstances do not in every case dictate simultaneous and similar actions. The Court, in *Moog Industries v. Federal Trade Commission, supra*, touched on the administrative problems involved in correcting industrywide unlawful practices. It stated that there must be a determination as to whether and to what extent there is a relevant "industry" within which the particular respondent competes and "whether or not the nature of that competition is such as to indicate identical treatment of the entire industry. . . ." The Court added that although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect that fact, and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency (355 U.S. 413).

Furthermore, respondent itself states that it was served with an order to file a special report pursuant to a Commission resolution of May 14, 1968, authorizing an investigation of the market structure, sale and distribution of automotive parts, accessories and equipment for use in determining whether the acquisition of any company by any other company manufacturing automotive parts and equipment may be in violation of Section 7 of the amended Clayton Act or any other statute administered by the Federal Trade Commission. Complaint counsel, in their opposition briefs, concede that a merger investigation is now pending specifically against another firm in the industry—Genuine Parts Company. This matter, they point out, has become public as a result of a declaratory judgment action filed in the Northern District of Georgia on August 14, 1968 (*Genuine Parts Company v. Federal Trade Commission, et al.*, Civ. No. 12030). Such public disclosures, while they do not indicate one way or the other that the Commission will in the future issue a complaint or take any kind of administrative action against any competitor of respondent, suggest at least general consideration by the Commission of the automotive replacement parts field.

Finally, the complaint was issued in this proceeding because the Commission had reason to believe that the law as charged had been violated. Some of the points which respondent raises appear to go to the merits of the charges in the complaint. Certain others possibly concern matters bearing on the remedy, if any. It is our belief that in the circumstances the proper time to raise such arguments and issues is at the trial in this proceeding—not on a motion to dismiss.

Respondent's further point that the Commission deal with the matter on an industrywide basis is rejected. Respondent has made no substantial showing that the practice with which it is charged is an industrywide problem or that, assuming it is industrywide, the best course of action would be by the promulgation of rules of general applicability. *Cf. Lehigh Portland Cement Company*, Docket No. 8680 (order issued February 6, 1967) [71 F.T.C. 1618], and *General Transmissions Corporation of Washington*, Docket No. 8713 (order issued December 1, 1966) [70 F.T.C. 1833]. General rules would not afford a remedy for past acquisitions if the charges in the complaint are sustained. *Cf. Texas Industries, Inc.*, Docket No. 8656 (order issued April 14, 1965) [67 F.T.C. 1363].

Accordingly, respondent's request for permission to file an interlocutory appeal and motion to dismiss the complaint or stay proceedings will be denied. An appropriate order will be entered.

Commissioner Elman did not concur.

ORDER DENYING RESPONDENT'S REQUEST TO FILE INTERLOCUTORY  
APPEAL AND MOTION TO DISMISS THE COMPLAINT OR  
STAY PROCEEDING

Upon consideration of respondent's request for permission to file interlocutory appeal filed September 11, 1968, and its motion to dismiss the complaint or stay the proceeding, filed August 19, 1968, treated as a motion certified, and for the reasons stated in the accompanying opinion:

*It is ordered*, That respondent's request for permission to file an interlocutory appeal filed September 11, 1968, and its motion to dismiss the complaint or stay the proceeding, treated as certified, be, and they hereby are, denied.

Commissioner Elman not concurring.

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SAV-COTE CHEMICAL LABORATORIES, INC., ET AL.

*Docket C-716. Order, Oct. 25, 1968*

Order denying respondent's request to modify decision and order.

ORDER DENYING PETITION TO MODIFY DECISION AND ORDER

This matter is before the Commission upon respondents' petition to modify decision and order, filed September 6, 1968, and complaint counsel's answer in opposition thereto, filed October 4, 1968.

Pursuant to the terms of a consent agreement, the Commission, on February 19, 1964 [64 F.T.C. 892], issued an order to cease and desist in this matter, dealing with false and misleading advertising by petitioners of their paint and coating products.<sup>1</sup> Subsequent to a compliance investigation resulting in a finding that petitioners have violated the terms of the order to cease and desist, the matter was certified to the Attorney General of the United States on July 12, 1967, for the purpose of requesting the recovery of civil penalties from petitioners. On May 9, 1968, the United States Attorney for the District of New Jersey filed a complaint against defendants (petitioners herein) in the United States District Court for the District of New Jersey, among others to recover civil penalties for violations of the Commission's cease and desist order. Defendants (petitioners) obtained an adjournment of the penalty proceeding until November 18 for the reason that defendants (petitioners) had filed this Petition to Modify Decision and Order presently before the Commission.

Petitioners did not file their petition for modification with the Commission until almost a full four months after the complaint in the civil penalty proceeding for violation of the order had been filed. Furthermore, petitioners had every opportunity between May 9, 1964, the date the cease and desist order became effective, and May 9, 1968, the date the complaint in the civil penalty proceeding was filed, during which to petition the Commission for modification of the order. Coming at the present time, the petition for modification is inopportune and does not present an adequate showing on the merits. For those reasons it will be denied. The correct time to file such a petition is before the Commission has asked the Attorney General to seek the recovery of civil penalties and not four months after the complaint in such a proceeding has been filed.

Furthermore, although it is not necessary to deal with this question at this time, it is pointed out that § 3.72(b)(2) of the Commission's Rules of Practice provides that the modification of an order to cease and desist requires either changed conditions of fact or law or that the requested modification be in the public interest. A review of the exhibits attached to the petition persuades us that neither of these requirements has been met. The information contained in these exhibits is substantially the same as, and does not add anything to, the information before the Com-

<sup>1</sup> On June 13, 1962, petitioners submitted a letter of discontinuance involving the same practices, the terms of which petitioners failed to adhere to.

mission at the time it determined to issue its decision and order. Accordingly,

*It is ordered*, That respondents' petition to modify the decision and order be, and it hereby is, denied.

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AVON PUBLICATIONS, INC., ET AL.

*Docket 6911. Order, Oct. 28, 1968*

Order reopening proceedings for purpose of determining whether The Hearst Corporation is successor to respondents in this case.

The Commission on August 17, 1967, having issued its order to show cause why its order to cease and desist dated October 21, 1958 [55 F.T.C. 619], should not be reopened and modified, and having caused said show cause order to be served upon The Hearst Corporation, and

The Hearst Corporation by its counsel on September 27, 1967, having filed its special answer moving that such service be set aside as invalid on the ground that movant is not a respondent in nor a party to the proceeding, and counsel for the Commission on December 15, 1967, having filed their Motion to Vacate Show Cause Order, and

The Commission being informed by the pleadings that all of the assets of the corporate respondents were acquired and operated by movant Hearst and being of the opinion that the record is insufficient to support any conclusion as to whether said movant is the successor to respondents, and

It therefore appearing that the pleadings raise a substantial factual issue requiring hearings for the receipt of evidence in support of and in opposition to that issue, pursuant to § 3.72(b) (3) of the Commission's Rules of Practice for Adjudicative Proceedings,

*It is ordered*, That said proceedings be, and they hereby are, reopened and this matter be assigned to a hearing examiner for the receipt of such testimony and evidence as may be offered in support of and in opposition to the factual issue as to whether The Hearst Corporation is the successor to any of the corporate respondents in these proceedings.

Commissioner MacIntyre abstained from this action of the Commission but without prejudice to his participation in future actions and decisions of the Commission regarding this matter.

## THE J. B. WILLIAMS COMPANY, INC., ET AL.

*Docket 8547. Order, Oct. 28, 1968*

Order directing a public hearing on the question whether the advertising of "Geritol" by respondents is violating the cease and desist order.

ORDER DIRECTING PUBLIC HEARING CONCERNING COMPLIANCE  
WITH ORDER TO CEASE AND DESIST

Respondents, J. B. Williams Company, Inc., and Parkson Advertising Agency, Inc., have filed a report purporting to show their compliance with the order to cease and desist entered in Docket No. 8547 [68 F.T.C. 481]. A review of that report indicates that advertising for the product Geritol, principally television commercials, prepared by respondents and shown or published since the cease and desist order became final, may not comply with the order. In particular, such review raises the question whether in such commercials the affirmative disclosures required by the Commission's order have been obscured and their purpose thwarted, and whether the overall impression created by respondents' advertising continues to be the false and misleading one that Geritol is a remedy for tiredness in more than a small minority of persons, that relief will be experienced in a very short time, and that tiredness is a generally reliable indication of iron deficiency or iron deficiency anemia. Compliance with the Commission's order requires that respondents' advertising not mislead the viewer or reader; in essence, if Geritol is advertised as a remedy for tiredness, the overall impact of the advertisement must be to convey to the consumer accurately, succinctly, and unequivocally the facts that tiredness is not a reliable symptom of iron deficiency or iron deficiency anemia, that even if he is tired his tiredness is probably not attributable to iron deficiency or iron deficiency anemia, and that Geritol will probably not help or be of any value to him.

The Commission, having reviewed the report of compliance and having tentatively concluded therefrom that respondents may not be acting in compliance with the order entered in Docket No. 8547 [68 F.T.C. 481], believes that it should resolve this matter by viewing and considering in a hearing the television commercials in question. Accordingly,

*It is ordered,* That respondents deliver to the Secretary of the Commission, as soon as practicable, the films of all advertisements shown on local or national television since the effective date of the final order to cease and desist; and

*It is further ordered,* That a public hearing be held at 10 a.m.



on November 7, 1968, in Room 532, Federal Trade Commission Building, Washington, D.C., at which time the television commercials will be viewed by the Commission in the presence of respondents' counsel and their chief executive officers. Immediately thereafter, the Commission will hear argument directed to the question whether respondents, by disseminating any of such commercials, have violated the order to cease and desist.

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### KOPPERS COMPANY, INC.

*Docket 8755. Order and Opinion, Nov. 1, 1968*

Order denying respondent's appeals from hearing examiner's orders relating to subpoenas duces tecum directed to a third party.

#### OPINION OF THE COMMISSION

Before the Commission are two appeals by respondent, dated, respectively, August 28, 1968, and September 25, 1968, each raising a number of separate issues.<sup>1</sup> Since the issues posed by these several grounds for appeal are in large part interrelated, we believe that all should be resolved jointly in a single opinion. The ultimate issue of privilege for certain categories of documents sought by discovery herein cannot be determined until they have been reviewed in detail by the hearing examiner. Accordingly, questions with respect to rulings on this issue may be presented to the Commission upon review of the entire record.

#### I

By opinion and order of July 2, 1968 [p. 1574 herein], we remanded to the hearing examiner his grant of respondent's application for subpoena duces tecum directed to The United States Pipe and Foundry Company (hereafter U.S. Pipe). In passing upon the problems raised by respondent's intended inquiry into the business records of intervenor U.S. Pipe, we acknowledged that

Obviously, it may be difficult to separate out some of this raw data which would fall into the area of trade secrets from memoranda and other

<sup>1</sup>To date, four interlocutory opinions have issued herein, in which the chronology of the instant proceeding, which has yet to reach formal hearings, is amply described: Opinion and Order Denying Application for Subpoena Duces Tecum and Request for Release of Confidential Records, dated July 2, 1968 [p. 1579 herein]; Opinion and Order Denying Appeal from Examiner's Order and Request for Oral Argument, dated July 2, 1968 [p. 1574 herein]; Opinion and Order of Remand to Hearing Examiner, dated July 2, 1968 [p. 1571 herein]; Opinion and Order of Remand to Hearing Examiner, dated August 14, 1968 [p. 1593 herein].

documents which would relate to its (U.S. Pipe's) reasons for not entering this market.<sup>2</sup>

At the same time, it was suggested that the breadth of the subpoena would warrant the examiner's consideration on remand. The examiner's post-remand limitation of the subpoena to include only "studies and surveys," (excluding, for example, a report of sales performance upon which a more generalized "study" or "survey" might be based) is responsive to the considerations raised in our opinion.

As amended on remand, the subpoena required production of two classes of documents relating, respectively, to the pre- and post-entry segments of U.S. Pipe's venture into the resorcinol market. Respondent's objections to U.S. Pipe's return on the pre-entry portion relate in the main to the allegedly inadequate volume of information submitted. Respondent urges that U.S. Pipe possesses additional relevant documentary data relating to the pre-entry period, but does not claim that such data would fall within the terms of the subpoena as construed by the examiner. U.S. Pipe submitted no documents in response to the post-entry segment of the subpoena for the asserted reason that it possessed no "study" or "survey," "directly related to the continuance or discontinuance" of its resorcinol production. Here again, it is not argued that U.S. Pipe does in fact possess documents returnable under this portion of the subpoena, as construed. Return on the subpoena was made on August 5, 1968. Respondent subsequently moved that the examiner either certify to the Commission that U.S. Pipe had failed to comply with the subpoena or, in the alternative, order further production thereunder. Respondent also moved for the issuance of a wholly new subpoena covering matters which, in respondent's view, had been excluded from the scope of the first subpoena by the examiner's erroneous construction thereof. These motions were denied by order entered August 19, 1968, from which respondent now appeals.<sup>3</sup>

The suggestion to restrict the post-remand scope of the subpoena to "studies and surveys" originated with the respondent. This phraseology was adopted by the examiner after careful consideration and discussion on remand. We can neither credit, nor,

<sup>2</sup> Opinion and Order Denying Application for Subpoena Duces Tecum and Request for Release of Confidential Information, dated July 2, 1968, p. 4 [pp. 1621, 1622].

<sup>3</sup> Respondent's Brief on Appeal, dated August 28, 1968, indicates that it is filed "[p]ursuant to Sections 3.35 (b) and 3.23 (a) of the Commission's Rules of Practice," without indication of which of its three separate grounds for appeal are filed under each. Upon examination, the first and third ground for appeal prove to be of the class for which application for permission to appeal must be sought pursuant to Section 3.23 (a) while the remaining issue is subject to direct appeal under Section 3.35 (b).

indeed, could we possibly evaluate respondent's present contention that the phrase "studies and surveys" was given an unexpected or overly technical interpretation by the examiner in judging the adequacy of U.S. Pipe's return.

We find no fault in the examiner's construction of the subpoena or with his finding of compliance thereunder. Accordingly, respondent's application for leave to appeal from the examiner's finding of compliance is denied.

It is apparent, at the same time, that respondent's second application for subpoena duces tecum was not spurious. The examiner denied this application without prejudice upon his finding that:

... it would be improvident to issue a new subpoena covering a broader field than that previously issued while the Federal Trade Commission had under consideration an appeal from the protective order of the undersigned ... limiting the scope of depositions. . . .<sup>4</sup>

As sole support for its appeal from this ruling, respondent urges that discovery of documentary material must precede the taking of depositions. Upon the issuance of this opinion, questions of procedural priority among currently pending discovery orders and applications therefor will necessarily be raised and considered *de novo* in proceedings before the examiner. Accordingly, respondent's appeal is now moot, and will be denied. However, it is evident that the inability of U.S. Pipe to make a return on the post-entry portion of respondent's original subpoena duces tecum raises some doubt whether the purposes of pre-hearing discovery under the Commission's Rules of Practice may be fulfilled herein without a grant, in some form, of respondent's second application for subpoena duces tecum.

Objections to such disclosure on the part of U.S. Pipe are well taken. Cost, price, production and similar data are of a kind traditionally protected against compulsory disclosure in judicial proceedings. However, the often confidential nature of such material is not equivalent to an absolute privilege against its disclosure.<sup>5</sup> Even assuming that each item requested by respondent's second application for subpoena duces tecum is of a kind for which strict secrecy would be justified as a matter of sound business practice, a claim of privilege for such material cannot succeed if the need for its continued secrecy is found to be outweighed by its importance to the party seeking production in

<sup>4</sup> Order Denying Application for Subpoena Duces Tecum, issued August 19, 1968.

<sup>5</sup> *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir.), cert. denied, 380 U.S. 964 (1965). *Communist Party of the U.S. v. Subversive Activities Control Board*, 254 F.2d 314, 321. (D.C. Cir. 1958).

maintaining or refuting issues raised in litigation. In the present context, respondent seeks disclosure of the confidential business records of U.S. Pipe to assist in its preparation of a defense to the charge contained in complaint paragraph seven, which reads, in pertinent part, as follows:

Among the effects of respondent's acts and practices as above alleged in attempting to discourage and/or foreclose the entry of actual or potential rival producers into the resorcinol market, but not limited thereto, has been the failure of United States Pipe and Foundry Company to establish itself in the commercial resorcinol market as an alternate producer and/or viable competitor.

While we venture no opinion as to the kind or quality of evidence that would constitute a *prima facie* showing under this section, it would be patently improper to accept into evidence testimony of officers of U.S. Pipe, or documents from its files, in support of paragraph seven while at the same time honoring U.S. Pipe's assertion of a privilege against disclosing documents that might contradict such a showing. Moreover, without inquiry into contemporaneous business records, it would be difficult or impossible to establish whether U.S. Pipe's resorcinol venture was commercially viable and thus that it would have succeeded in the commercial resorcinol market had the alleged acts and practices of the respondent not taken place.

In the absence of a generalized "study" or "survey" of U.S. Pipe's post-entry experiences, it seems certain that respondent would be denied an adequate opportunity to prepare a defense under paragraph seven without some form of access to the very "raw data" that we suggested in our previous opinion<sup>6</sup> might not in fact be needed.

Upon a renewed application for subpoena duces tecum, the examiner is of course free to consider alternative methods whereby the conflicting considerations of secrecy on the one hand and disclosure on the other may be reconciled. There is, for example, the procedure adopted in Commission hearings in the matter of *Mississippi River Fuel Corporation*, Docket No. 8657 (Order issued June 8, 1966 [69 F.T.C. 1186] and July 15, 1966 [70 F.T.C. 1759]), whereby sensitive trade information can be submitted to an independent third party for analysis. Possibly suitable would be a procedure as yet untried in Commission hearings by which the party seeking protection could be required to prepare a non-confidential summary of the sought-for documents for inclusion in the record.<sup>7</sup> The examiner may also conduct an *ex parte*,

<sup>6</sup> *Supra*, n. 2.

<sup>7</sup> See E. Gellhorn, *The Treatment of Confidential Information By The Federal Trade Commission: The Hearing*, 116 U. Pa. L. Rev. 401, 422-423 (1968).

*in camera* examination of documents for the purpose of excising portions thereof before disclosure is made to the respondent. See, e.g., *Machin v. Zuckert*, 316 F. 2d 336, 341 (D.C. Cir.) *cert. denied*, 375 U.S. 896 (1963).<sup>8</sup>

Each of these proposed discovery techniques contains inherent drawbacks, however, and may in some instances impair substantially the value of information sought by respondent. The examiner must consider, in any given instance, whether the ends of justice would be better served by disclosure directly to the respondent, with such reasonable safeguards against misuse as have already been utilized in this proceeding with reference to *in camera* materials and the use of materials obtained by deposition.

In the third, and last, portion of respondent's appeal dated August 28, 1968, permission is sought to appeal from an order of the examiner<sup>9</sup> denying respondent's motion, pursuant to Section 3.36 of the Commission's Rules of Practice, for the production of documents in the possession of the Commission. Documents sought by this motion fall into two groups. First, disclosure was sought of all documents received by complaint counsel in response to a survey of manufacturing firms undertaken for purposes of investigation relative to this proceeding. Section 3.36 of the Commission's Rules of Practice provides that motions for the production of documents in the confidential records of the Commission:

. . . 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 . . . together with a showing that such material . . . is not available from other sources by voluntary methods or through other provisions of the rules in this chapter.

Denial of the first part of respondent's motion was based upon the examiner's view that respondent should be required to seek direct voluntary production of the survey responses from the companies surveyed. Respondent argues that such efforts, if attempted, would probably be unavailing, and urges that the examiner's application of the "other sources" requirement of Section 3.36 was thus arbitrary and unjust.

It was the examiner's view in denying respondent's motion that

<sup>8</sup> Such an *in camera* examination would be advisable as an initial matter in any event. *Westinghouse Electric Corporation v. City of Burlington*, 351 F. 2d 762, 770 (D.C. Cir. 1965); *Boeing Airplane Co. v. Coggeshall*, 280 F. 2d 654, 662 (1960); *Freeman v. Seligson*, D.C. Cir. No. 20,478, June 28, 1968.

<sup>9</sup> Order Denying Production of Confidential Records of Federal Trade Commission, dated August 19, 1968.

no determination of the protection, if any, to be afforded to portions of the survey responses containing possibly privileged matter could be made unless, upon a refusal of voluntary disclosure, the companies surveyed were allowed to appear herein in response to compulsory process.

As an initial matter, it may be possible to determine the intentions of the surveyed companies regarding the contents of their submissions by inquiry into the conditions upon which such documents were received by complaint counsel. If information obtained by survey was received upon the understanding that it could be divulged as necessary in Commission proceedings,<sup>10</sup> it would be clear that confidential treatment was neither sought nor desired, and data received on this basis could be reached by motion to produce with no risk of inadvertently divulging the trade secrets of third parties. To the extent that complaint counsel would not be free, without more, to place survey documents on the record herein, the necessity, if any, for their protection may best be raised by the firms from which they were received, and production should be sought from this quarter, as suggested by the examiner's ruling.

The second group of documents sought by motion to produce consist of "all" documents received by complaint counsel from U.S. Pipe that are relevant to this proceeding. Respondent's original motion for production of such documents was denied by opinion and order of July 2, 1968.<sup>11</sup> At that time, we held respondent's motion to be premature, as respondent had yet to exhaust its opportunities to obtain discovery directly from U.S. Pipe by subpoena duces tecum. This situation has not been altered. Moreover, respondent argued before the hearing examiner that, in seeking disclosure of documents received by complaint counsel from U.S. Pipe, it was motivated "solely"<sup>12</sup> by its desire to determine the adequacy of U.S. Pipe's return on a prior subpoena demanding copies of all documents supplied by U.S. Pipe to complaint counsel. It is evident that respondent's efforts to uncover U.S. Pipe's putative noncompliance with process, would, at this time, be better directed toward further discovery in preparation for formal hearings. Accordingly, we find that respondent's motion for the production of confidential documents in the possession of complaint counsel was properly denied, and

<sup>10</sup> We note in this connection that several documents received in response to the survey have been listed by complaint counsel for introduction as Commission exhibits.

<sup>11</sup> Opinion and Order Denying Application for Subpoena Duces Tecum and Request for Release of Confidential Records, dated July 2, 1968 [p. 1579 herein].

<sup>12</sup> Motion for the Production of Confidential Documents, dated August 8, 1968, p. 6.

respondent's application for leave to appeal from this ruling is denied.

## II

By opinion and order of July 2, 1968 [p. 1571 herein], we remanded to the hearing examiner his initial denial of respondent's application for leave to take depositions of six named officials of U.S. Pipe. In a subsequent action<sup>13</sup> we upheld, in all respects save one, a post-remand order of the examiner in which the requested depositions were granted subject to several conditions designed to assure the confidentiality of such material as might merit this protection. In particular, we affirmed the examiner's decision to exclude officials of the party respondent from the taking of depositions. In subsequent proceedings before the examiner, U.S. Pipe voluntarily withdrew its objection to the attendance of one of respondent's officers, its Secretary and General Counsel. This concession was adopted by the examiner in his order authorizing the taking of depositions. Respondent now, "with great regret," again raises the issue of attendance by its officers. It is urged that all officers of the party respondent must be permitted to attend as a matter of right. We have previously affirmed the examiner's exclusion of all officers of the respondent on the basis that their assistance in technical matters would not under the terms of the order authorizing depositions be required. The instant appeal merely reargues questions previously raised, and will accordingly be denied.<sup>14</sup>

In connection with this appeal, respondent urges that the affidavits it is required to file with the Secretary of the Commission indicating portions of the deposition transcript disclosed to corporate management personnel infringe upon the confidentiality of attorney-client communications. Respondent omits to mention that the filing procedure complaint of actually *permits* attorney-client communications, *i.e.*, disclosure of the deposition transcript, by allowing disclosure during the time in which U.S. Pipe must determine whether portions of the transcript warrant

<sup>13</sup> Opinion and Order of Remand to Hearing Examiner, dated August 14, 1968 [p. 1593 herein].

<sup>14</sup> We are aware that Rule 30(b) of the Federal Rules of Civil Procedure has been held to prevent a District Court from excluding *bona fide* officers of a party from the taking of depositions. *Queen City Brewing Co. v. Duncan*, 42 F.R.D. 32, 33 (D.C. D. Md. 1966). Section 3.33 of the Commission's Rules of Practice contains language that parallels the pertinent provisions of Federal Rule 30(b). Nevertheless, the taking of depositions is not equivalent to a judicial trial, with the attendant characteristics of a public hearing, *Dunlap v. Reading Co.*, 30 F.R.D. 129, 130-31 (D.C.E.D. Pa. 1962), and we do not view Federal Rule 30(b), as construed, to embody a constitutionally compelled requirement of due process affecting deposition proceedings under Section 3.33 of the Commission's Rules.

protection by motion for a protective order. Moreover, disclosure of the contents of the required affidavits would be available only for the purpose of determining compliance with the restrictions of the examiner's order against improper disclosure by respondent of material obtained by deposition. Lastly, we reject respondent's blanket assumption that disclosure by the affiant of the portion of the deposition transcript shown to him necessarily "forces disclosure of the consultation." Such a possibility seems remote. In any event, a resolution of this issue would depend upon the facts involved, and, accordingly, none will be attempted at this time.

Jointly with the above appeal, respondent has applied for leave to appeal, pursuant to Section 3.23 of the Commission's Rules of Practice, from an order of the examiner dated September 17, 1968, placing *in camera* certain documents produced by U.S. Pipe. Initially, respondent argues that the examiner has exceeded his authority in entering this order.

Section 3.45(a) of the Commission's Rules of Practice specifies that access to *in camera* material "shall" be limited to "respondents, their counsel, authorized Commission personnel, and court personnel concerned with judicial review. . . ."

In essence, respondent contends that the word "respondents," as it appears above, must be read as requiring that access to *in camera* material must in all cases be granted to as many persons as can qualify as a legal representative, however defined, of a "respondent." The limitations imposed by the examiner on access to and use of *in camera* documents do not exceed those controlling disclosure of the deposition transcript. Clearly, the examiner's authority to create protective provisions based on the facts and circumstances of each case would be severely limited by respondent's construction of Section 3.45(a).<sup>15</sup>

Additionally, respondent questions the adequacy of the showing upon which the examiner determined that documents of U.S. Pipe were deserving of *in camera* treatment. We need not consider this contention, for, even assuming that the showing was inadequate, the effect upon respondent could hardly be of such a magnitude that, pursuant to Section 3.23(a) of the Commission's Rules "a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice." Accordingly, respondent's application for leave to appeal is denied.

Commissioner MacIntyre concurred in the result.

<sup>15</sup> In District Court proceedings, it is established that access to material obtained by subpoena may be denied to the parties themselves. *Covey Oil Co. v. Continental Oil Co.*, *supra*, n. 5 at 999.



ORDER DENYING INTERLOCUTORY APPEALS AND REQUESTS FOR  
PERMISSION TO FILE INTERLOCUTORY APPEALS

Upon consideration of respondent's appeals dated August 28, 1968, and September 25, 1968, and for the reasons stated in the accompanying opinion,

*It is ordered*, That the appeals of respondent from the hearing examiner's orders of August 19, 1968, and September 17, 1968, be, and they hereby are, denied, and

*It is further ordered*, That respondent's applications for leave to appeal from the hearing examiner's orders of August 19, 1968, and September 17, 1968, be, and they hereby are, denied.

Commissioner MacIntyre concurred in the result.

## LEHIGH PORTLAND CEMENT COMPANY

*Docket 8680. Order and Opinion, Nov. 22, 1968*

Order denying appeals from 38 third parties from a hearing examiner's order directing parties to comply with subpoenas duces tecum.

## OPINION OF THE COMMISSION

This matter is before the Commission upon the appeals of numerous third parties.<sup>1</sup>

On January 11, 1968, subpoenas duces tecum were issued to 81 ready-mixed concrete companies on behalf of respondent. On January 25, 1968, 36 additional subpoenas duces tecum were issued to portland cement manufacturers on behalf of respondent. Subsequently, 47 ready-mix firms and 22 portland cement manufacturers complied with the subpoenas. Motions to quash were filed by 29 ready-mix firms and 13 portland cement firms.

All third-party motions to quash claimed that some of the information sought by various subpoena specifications was highly confidential and should not be divulged to respondent or respondent-

<sup>1</sup> The following interlocutory appeals from the hearing examiner's order have been filed:

(a) Memorandum in Support of Appeal by Ready-Mix Companies from the Hearing Examiner's Order of September 24, 1968 (October 21, 1968) (14 firms);

(b) Memorandum in Support of Appeal to Commission from Hearing Examiner's Order of September 24, 1968 (October 21, 1968) (15 firms);

(c) Memorandum in Support of Appeal by Six Cement Companies from the Hearing Examiner's Order of September 24, 1968 (October 21, 1968);

(d) Memorandum in Support of Appeal of Marquette Cement Manufacturing Company from the Hearing Examiner's Order of September 24, 1968 (October 21, 1968);

(e) Appeal by National Gypsum Company from Order Directing Third-Party Cement and Ready-Mixed Concrete Manufacturers to Comply with the Examiner's Orders Modifying Subpoenas Issued in Respondent's Behalf (October 7, 1968); and

(f) Appeal of Dundee Cement in Response to Order Directing Third-Party Cement and Ready-Mix Concrete Manufacturers to Comply with the Examiner's Orders Modifying Subpoenas Issued in Respondent's Behalf in this Proceeding (October 7, 1968).

ent's counsel but only to an independent accounting firm in accordance with the procedure utilized in *Mississippi River Fuel Corporation*, Docket No. 8657 (orders issued June 8, 1966 [69 F.T.C. 1186], and July 15, 1966 [70 F.T.C. 1759]). The portland cement firms also claimed that the subpoenas were unduly broad as to geographic scope.

On May 29, 1968, the original hearing examiner ruled on the motions to quash the January 11, 1968, subpoenas, and on June 14, 1968, he ruled on the motions to quash the January 25, 1968, subpoenas. The examiner ruled that the subpoenas should be modified and that much of the sales and pricing data called for by various specifications should be submitted to a disinterested accounting firm which would compile and present the material to respondent's counsel in such a manner that no individual company's confidential arrangements or data would be revealed. The examiner also ordered that the geographic scope of the subpoenas directed to the portland cement manufacturers should be restricted.

Respondent filed two appeals from these rulings on the primary ground that the restrictive *Mississippi River*<sup>2</sup> confidentiality procedure impairs respondent's right to prepare adequately for cross-examination and needlessly prejudices respondent's ability to conduct an effective defense, especially when sufficient protection can be afforded by other, less prejudicial, means. Many third parties filed answers defending the examiner's ruling. Additionally, 14 third parties also filed appeals on the ground that the examiner should have included even more subpoena specifications in the *Mississippi River* treatment ordered.

The examiner stated in his orders that inasmuch as some of the specifications in this proceeding are similar to those at issue in the *Mississippi River* case and despite some misgivings as to the propriety of this treatment in this instance, he nevertheless was bound by Commission precedent to order the use of the same procedures.

The Commission on August 2, 1968, issued an order remanding the matter to the new examiner for reconsideration. In our opinion remanding this matter, we stated *inter alia*:

We believe that the examiner has incorrectly interpreted our decisions in the *Mississippi River* case. The Commission in that case neither stated nor implied that henceforth such treatment was to be mandatory. We merely held that under the facts of that proceeding the treatment ordered was appropriate. The Commission was, and is, loath to substitute its judgment for the examiner's judgment on such matters. This requires, however, that the examiner must actively and independently evaluate all of the counter-

<sup>2</sup> *Mississippi River Fuel Corporation*, Docket 8657 (order issued June 8, 1966), pp. 4-5 [69 F.T.C. 1186, 1189].

vailing factors in reaching his decision. The examiner, because of his proximity to the case, is, in the first instance, in a far better position to assess the multitude of variables inherent in the delicate balancing of interests between the respondent's need to know sensitive information and the third party's need to protect the same valuable information from his competitor. It is indeed conceivable that, depending on the particular facts, similar specifications may require dissimilar treatment in order to insure the most equitable resolution of these conflicting interests. Because of the examiner's misconstruction of the *Mississippi River* opinions, we are not convinced that such evaluation has been given to this matter.<sup>3</sup>

Following the Order of Remand, appellants cited no additional facts and filed no further briefs with the hearing examiner. On September 24, 1968, after having "carefully reviewed all the documents," pleadings and rulings pertaining to these discovery questions, the examiner ordered appellants to comply with the subpoena *duces tecum*.<sup>4</sup>

Although the examiner declined to order the requested *Mississippi River* treatment for the third-party data, the examiner did fashion a protective order which restricted disclosure of the information at issue to respondent's trial attorneys. Furthermore, to assure against any possibility that the particular information sought in this case would be used for any competitive purpose, the examiner ordered that the data could only be made available to complaint counsel to the extent that the information is to be used in respondent's defense; that no copies shall be made of the materials except those to be used as exhibits in the hearing; that all materials which do not become a part of the official record will be returned to the third parties; and that no information will be made public until further order of the examiner.<sup>5</sup>

Appellants' objections to this order of the examiner are the same as those raised against the previous examiner's orders. In essence, the appellants assert that requested information dealing with financial relationships between cement manufacturers and ready-mixed concrete firms is trade secret information whose disclosure to respondent Lehigh or to the trade at large would cause irreparable injury to appellants.<sup>6</sup>

<sup>3</sup> *Lehigh Portland Cement Company*, Docket 8680 (order issued August 2, 1968), p. 3 [p. 1587, herein].

<sup>4</sup> Order Directing Third-Party Cement and Ready-Mixed Concrete Manufacturers to Comply with the Examiner's Orders Modifying Subpoenas issued in Respondent's Behalf in this Proceeding (September 24, 1968).

<sup>5</sup> *Id.* at p. 3.

<sup>6</sup> Appellants also asserted that the examiner failed to order "in camera treatment for any information introduced" in evidence by respondent. See, e.g., Memorandum in Support of Appeal by Ready-Mix Companies from the Hearing Examiner's Order of September 24, 1968, p. 5 (October 21, 1968). This assertion is obviously premature. There is a possibility that none of the information will be offered into evidence. If respondent does offer any of the information into evidence, appellants will have every opportunity to urge *in camera* treatment for the information. Until such time, the examiner specifically prohibited respondent's counsel from disclosing any such information to Lehigh, to the trade at large, or to the public.

This Commission can appreciate the serious consequences of unwarranted disclosure of sensitive business information. However, it seems clear to us that the examiner has carefully considered our previous opinion (quoted in part above) remanding the prior appeals on the identical issues. The examiner's order indicates a thoughtful and workable balancing of the conflicting interests inherent in any such situation. On the one hand, the September 24, 1968, order has provided for the preservation of the requested pretrial discovery information in a manner which respondent finds useful and satisfactory in preparing for cross-examination and for preparation of defense. On the other hand, the order carefully prevents the alleged injuries which might flow from disclosure of the data to Lehigh or to the trade at large by restricting its availability to respondent's counsel alone.

We find that the examiner has carefully attempted to consider the particular facts of this discovery dispute and has tailored a protective order which attempts to fully and fairly balance the potentially conflicting needs of respondent and the third parties. Inasmuch as appellants have failed to present any convincing evidence that the examiner has abused his discretion, we deny the appeals. An appropriate order will be entered.

Commissioner MacIntyre did not participate.

#### ORDER DENYING INTERLOCUTORY APPEALS

Upon consideration of the appeals of 38 third parties from the hearing examiner's order of September 24, 1968, and for the reasons stated in the accompanying opinion:

*It is ordered,* That the third-party appeals from the September 24, 1968, order of the hearing examiner directing third-party cement and ready-mixed concrete manufacturers to comply with the examiner's order modifying subpoenas duces tecum issued in respondent's behalf be, and they hereby are, denied.

*It is further ordered,* That this matter be, and it hereby is, remanded to the hearing examiner in order that he may set a new effective date for his order of September 24, 1968, and for such other further proceedings as may be appropriate.

Commissioner MacIntyre not participating.

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#### THE J. B. WILLIAMS COMPANY, INC., ET AL.

*Docket 8547. Findings and Opinion, Dec. 2, 1968*

Findings of Commission that respondents have failed to comply with order inhibiting them from misrepresenting the effectiveness of "Geritol" liquid and tablets.

FINDINGS AND OPINIONS OF THE COMMISSION CONCERNING  
COMPLIANCE WITH ORDER TO CEASE AND DESIST

The Commission, after reviewing the report of compliance in this matter, tentatively concluded therefrom that respondents might not be acting in compliance with the final order entered herein. Therefore, at the direction of the Commission, a public hearing was held on November 14, 1968, at which eight of the television commercials prepared by respondents and shown or published since the cease and desist order became final were viewed by the Commission in the presence of respondents' counsel and their chief executive officers, *viz.*, Mr. Matthew Rosenhaus, chairman of the board, The J. B. Williams Company, Mr. Henry E. Shultz, vice-president and general counsel, The J. B. Williams Company, and Mr. Edward Kletter, chairman of the board, Parkson Advertising Agency. The Commission heard argument directed to the question whether respondents, by disseminating these commercials, have violated the order to cease and desist. The eight television commercials viewed at this hearing were agreed by counsel to be fairly representative of all commercials for Geritol shown on television from December 31, 1967, the date when the order of the Commission became final, and October 28, 1968. In addition, the scripts and films of the twenty-one other television commercials for Geritol broadcast during this period of time have been furnished to the Commission.

We conclude that respondents, in the preparation and dissemination of the television commercials in question, have failed to comply with the final order of the Commission in this matter. As was clearly stated in our original opinion in this case, the major vice of the previous advertising for Geritol was that it created the overall impression that Geritol is a remedy for tiredness in more than a small minority of persons, an impression which is false and misleading.<sup>1</sup> This was recognized by the Court of Appeals for the Sixth Circuit in affirming the Commission's order, after first modifying it by deleting one paragraph therefrom.<sup>2</sup> See 381 F. 2d at 889-90. The Court of Appeals stated at page 891:

The Commission has found, and we have agreed, that the advertisements create the impression that iron deficiency anemia causes most tiredness. . . .

<sup>1</sup> It is the overall impact of the entire commercial to which our attention is directed when considering possible deception therein. *Carter Products, Inc. v. Federal Trade Commission*, 323 F. 2d 523, 528 (5th Cir. 1963); *J. B. Williams Co. v. Federal Trade Commission*, 381 F. 2d 884, 889 (6th Cir. 1967) (judicial review of the Commission's order in this matter).

<sup>2</sup> The Court of Appeals deleted from the Commission's order original paragraph 1(f) which prohibited representations that iron deficiency anemia can be self-diagnosed. The Court stated: "The danger to be remedied here has been fully and adequately taken care of in the other requirements of the Order." 381 F. 2d at 891.

*It is this representation that Geritol is good for most tiredness which is the inherent vice of the advertisements.* [Emphasis added.]

The commercials broadcast for Geritol since the order in this matter became final not only fail to comply with the order but, in many instances, have so forcefully left the viewer with the overall impression—*i.e.*, that Geritol is a generally effective remedy for tiredness—that they are no less objectionable than the commercials denounced by the Commission when it issued the original order herein. For example, five of the eight commercials viewed at the hearing of November 14, 1968, depict the transformation of a wan, lackadaisical housewife into a veritable tigress. Typical of these five is the commercial entitled “Man Coming Home” (CX G-537-30-MA-REV. # 2). This depicts a smiling husband entering his home, where he is dismayed by the sight of his wife. She is in curlers, tired looking and leaning against the doorway. Moreover, the kitchen appears to have been untouched for some time, being strewn with unwashed pots and pans. The husband, feigning anger, draws a pistol from his jacket and fires it at his now apprehensive wife. From the pistol emerges a flag reading “Iron-poor tired blood? Try Geritol.” A card reading “later” appears on the television screen, followed by the same setting but with remarkable differences. The household is spotless. The haggard-looking woman seen at the beginning of the commercial now is attractively coiffured and made up, and in the wording of the script for this commercial, “garbed in a slinky gown.” Her husband enters to find her so attired and posing against the piano with “a ‘come hither’ expression” and a rose in her mouth. She literally sweeps her husband off his feet by embracing him passionately and enthusiastically, as the commercial ends with the words “Feel stronger fast” appearing on the screen, and the audio portion of the commercial advising the viewer that “If you’re tired because of iron-poor blood, Geritol can help *you* feel stronger fast. Maybe not *this* fast. But fast.” (Emphasis in script.)

Respondents, in their advertising and in their defense of the propriety of that advertising, continue to treat that portion of the population suffering from tiredness as equal to that portion of the population which experiences tiredness due to iron deficiency anemia. As stated in our original opinion, there is no basis for equating iron deficiency or iron deficiency anemia with tiredness. We found that many people with *mild* iron deficiency anemia exhibit no tiredness symptoms, that many people with *severe* iron deficiency anemia do not exhibit the symptoms of tiredness dis-

played in the advertisements for Geritol,<sup>3</sup> and that the number of people experiencing tiredness symptoms as a result of deficiency of the ingredients of Geritol is "infinitesimally small." (P. 13) [68 F.T.C. at 545].<sup>4</sup>

In paragraph 1(d) of our order, we prohibited any advertisement representing that the use of Geritol will be beneficial in the treatment of tiredness unless the claim of effectiveness was expressly limited to those persons whose symptoms were due to iron deficiency, iron deficiency anemia, or deficiency of vitamins contained in the product, "and further, unless the advertisement also discloses clearly and conspicuously that: (1) in the great majority of persons who experience such symptoms, these symptoms are not caused by a deficiency of one or more of the vitamins contained in the preparation or by iron deficiency or iron deficiency anemia and (2) for such persons the preparation will be of no benefit." Counsel for respondents contended at the hearing on November 14, 1968, that this provision of the order was being complied with by the following statement which is announced in the audio portion of all Geritol commercials telecast during the time in question: "The great majority of tired people don't feel that way because of iron-poor blood and Geritol won't help them," which is immediately followed by such phrases as "but it *is* a medical fact that many of the millions of people who have iron-poor blood are tired and need Geritol" (*e.g.*, CX G-537-45-MA-REV # 2, emphasis in script), or "but millions do have iron-poor blood and you could be one of the many who are tired for that reason and need Geritol" (*e.g.*, CX G-208-40).

We reject respondents' contention that the announced disclosure complies with the order. We find that the disclosure is negated and rendered meaningless when it is viewed in the whole context of the advertising, and further, that the disclosure itself is made insufficient by the use of such general terms as "millions" and "many" immediately following it. Moreover, in obscuring and negating the disclosure, respondents have not only failed to comply with paragraph 1(d) of the order, but have also contravened the provisions of 1(c) and 1(e). These paragraphs prohibit, respectively, any representation that Geritol will be of benefit in relieving tiredness in more than a small minority of persons and any representation that tiredness is a generally reliable indication of iron deficiency or iron deficiency anemia.

<sup>3</sup> The primary symptoms of severe iron deficiency include such things as cracks at the corner of the mouth, brittle or spoon-shaped fingernails, early graying of hair, and a smooth, sore tongue (opinion, p. 10, n. 7 [68 F.T.C. 481, 543]; See 381 F. 2d at 888-89).

<sup>4</sup> And see 381 F. 2d at 888-90 where the Court of Appeals upheld these findings.

Respondents should have been aware of the requirements surrounding the use of the affirmative disclosure in any advertisement recommending Geritol as a remedy for tiredness. We informed them in the opinion accompanying our order that the mere recitation of the words of paragraph 1(d) of the order would not be in compliance with the order if the disclosure was negated or obscured by the overall impression created by the advertisement in which the disclosure was contained. At p. 15 [68 F.T.C. at 547] of the opinion, it was stated:

This affirmative disclosure is necessary in every instance in which Geritol is advertised as a treatment for the relief of the tiredness symptoms. The purpose of such disclosure is to remove the likelihood of deception inherent in any claim of effectiveness for Geritol on the tiredness symptoms, even though such claim be limited to tiredness symptoms due to iron or vitamin deficiency. It seems obvious, however, that the likelihood of the public being deceived into believing that other than a small minority of tired persons will find relief for these symptoms by taking Geritol will continue to exist if in any advertisement the other representations are inconsistent with the facts affirmatively disclosed.<sup>5</sup> Such other claims can only serve to confuse and thereby deceive, thus nullifying the purpose of the required disclosure. Therefore, *in advertising in which an affirmative disclosure is required, respondents may make no representations, directly or by implication, which in any way negate or contradict the facts which are affirmatively disclosed. In other words, if despite the affirmative disclosure, any advertising conveys the impression that Geritol will be of benefit in relieving tiredness generally or in other than a small minority of persons with such symptoms, such advertising will be deceptive and in violation of the order to be entered herein.* Emphasis added.

We do not believe that any prospective consumer viewing the commercials in question would consider that the disclaimer limits the claims of relief from tiredness in the manner required by our order. Indeed, the visual impact of several of these commercials, in the primarily visual medium of television, is so strong that it is doubtful that any audio disclaimer run in conjunction with the visual images would be sufficient to protect the viewing public from being left with the erroneous overall impression that Geritol is a generally effective remedy for tiredness.<sup>6</sup>

The presentation of these commercials is such that the viewer is left not only with an erroneous impression as to the capabili-

<sup>5</sup> Commission's footnote: "Under this order, as under similar orders requiring affirmative disclosure of facts necessary to prevent an otherwise unqualified claim from being false or misleading, the disclosure must be made in immediate or close proximity with the claim and with equal prominence. The advertisement, regarded as a whole, should not leave any impression negating or obscuring the necessary affirmative disclosure, for otherwise the order would be rendered nugatory."

<sup>6</sup> We are not swayed by the argument of respondents that the Commission could not judge satisfactorily the impact of these commercials on the viewing public because they were shown to the Commission at a public hearing in a different setting than that involving the "average"



ties of Geritol in providing relief from tiredness, but also with an erroneous impression as to the length of time in which Geritol will provide relief. Use of such terms as "later" and "Feel stronger fast," while perhaps not objectionable in themselves, cannot be considered in compliance with the order when these phrases are presented in conjunction with visual presentations such as that described in the "Man Coming Home" commercial. Viewing of such commercials leaves the clear impression that Geritol will be effective in relieving tiredness almost instantly, certainly within a very short period of time. Such an impression violates the provisions of paragraph 1(f) of the order which prohibits the representation that the use of Geritol will increase the strength and energy of the body in any time less than that in which the consumer may actually experience improvement. Although the precise time in which relief will be experienced is not readily determined, it is clear that the time is considerably longer than that indicated by the commercials. (See p. 4 of our original opinion in this matter [68 F.T.C. at 538].)

Respondents have contended that the Commission will, in effect, destroy their right to advertise Geritol if such commercials as those in question are not permitted. However, as was noted in our original opinion (p. 14) [68 F.T.C. at 546], there were two courses by which we could have prevented the deception inherent in the advertising for Geritol: (1) by requiring the omission from such advertising of all reference to the effectiveness of Geritol on tiredness symptoms, or (2) by requiring an express statement of the limitations of the effectiveness of Geritol on such symptoms, if any claim of effectiveness on these symptoms is made. Respondents plainly have no right to convey to the public the false and misleading impression that Geritol is a generally effective remedy for tiredness.<sup>7</sup>

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viewer of the commercials. We have given such factors due consideration, which is the case in each of the many instances where we are called upon to use our expertise in determining whether a television commercial is false and misleading.

Although the full impact of the commercials here under review can be appreciated only upon viewing them some indication of their tone may be gained from study of the scripts. Attached hereto are the scripts of three of the films shown at the hearing of November 14, 1968 (CX G-537-30-ML-REV # 2, "Man Coming Home"; CX G-543-40-ALT-REV., "Judge-Book"; CX G-206-30, "Answer Is Yes"). Comparison of these scripts with the scripts for earlier Geritol commercials which were appended to the opinion accompanying the Commission's original order and appended to the court's opinion (381 F.2d at 893) demonstrates the continuation of the message that Geritol is a generally effective remedy for tiredness.

<sup>7</sup> Cf. *Murray Space Shoe Corp. v. Federal Trade Commission*, 304 F.2d 270, 272 (2d Cir. 1962) (no constitutional right to disseminate false and misleading advertisements); *Slough v. Federal Trade Commission*, 396 F.2d 870, 872 (5th Cir. 1968), *Slough's* petition for certiorari pending, Sup. Ct. No. 550 (no right to engage in business which can operate only by the use of deceptive practices).

Another argument of respondents is that the commercials are directed toward a specific segment of the population, *viz.*, women of the child-bearing years. The commercials in question, like earlier advertisements for Geritol, are directed to the general population. A listing of the broad range of programs on which these commercials were shown supports our judgment. The message of these commercials was presented on literally every type of program available to a television advertiser, including daytime soap operas, evening news programs, western series, comedy series, network motion picture presentations, and special events such as national political conventions.

As to the argument of respondents that this order is not clear, we reply that not only the members of this Commission but the panel of the Court of Appeals for the Sixth Circuit which reviewed our decision considered this order to fairly apprise respondents "of what is required of them." 381 F. 2d at 891.

The Commission concludes that the commercials in question failed to comply with its order. We hereby advise respondents that, in order to avoid future enforcement proceedings, they discontinue immediately the broadcast of any of the television commercials furnished the Commission at the hearing of November 14, 1968, or any similar commercials. By producing and disseminating these commercials, respondents have ignored the clear terms of the final order.

Respondents are directed to file with the Commission no later than January 31, 1969, a report of compliance showing that such commercials are no longer being broadcast and that respondents are in full compliance with the order to cease and desist. If no such report is filed by that date, or if it is found to be unsatisfactory, the Commission will take such enforcement actions as may be necessary to assure that its order and the decree of enforcement entered by the Court of Appeals do not continue to be flouted by respondents, including certification of the matter to the Court of Appeals with the recommendation that civil contempt proceedings be promptly commenced.

TITLE: "MAN COMING HOME"

COPY CODE: GER-TV-594

TIME: :30

WORD COUNT:65

GERITOL COLOR FILM

#G-537-30-MA-REV #2

TV SCRIPT PARKSON ADVERTISING AGENCY, INC.

- |  |   |
|--|---|
| <p>1. OPEN ON HUSBAND CLOSING DOOR. HE GLANCES SADLY AHEAD OF HIM.</p> | <p>1. (MUSIC: GAY INTRO, BUT CHANGING MOODS TO FIT SCENES THROUGHOUT)</p> |
|--|---|

- |   |  |
|---|--|
| 2. CUT TO HIS WIFE IN CURLERS. SHE IS TIRED-LOOKING AND LEANING AGAINST DOOR.   | 2. <i>ANNCR. (V.O.):</i> Now, the great majority of tired people don't feel that way   |
| 3. CUT TO HUSBAND APPROACHING HER.  | 3. . . . because of iron-poor blood . . .  |
| 4. CUT TO REVERSE ANGLE AS HE KISSES HER AND STARES AHEAD IN HORROR.  | 4. . . . and Geritol won't help them, but it is . . .  |
| 5. CUT TO MESSED-UP KITCHEN.  | 5. . . . a medical fact that many of the millions . . .  |
| 6. CUT TO HUSBAND, WHO STARTS TO DRAW PISTOL FROM HIS JACKET. HE POINTS IT.   | 6. . . . of people who have iron-poor blood . . .  |
| 7. CUT TO WIFE WITH GUN AGAINST HER NOSE. AS HIS FINGER PULLS TRIGGER, FLAG DROPS FROM IT READING: "IRON-POOR TIRED BLOOD? TRY GERITOL."—SHE READS IT.                  | 7. . . . are tired and need Geritol.   |
| 8. CUT TO CARD: "LATER"   | 8. —   |
| 9. CUT TO INTERIOR SHOT OF HUSBAND ENTERING FRONT DOOR. HE IS DEJECTED. HE LOOKS FORWARD IN SURPRISE.   | 9. —   |
| 10. CUT TO KITCHEN, WHICH IS NOW CLEAN AND NEAT.  | 10. —  |
| 11. CUT BACK TO HUSBAND, WHO LOOKS AHEAD AND REGISTERS GREAT SHOCK.   | 11. —  |
| 12. CUT TO WIFE, WHO IS GARBED IN A SLINKY GOWN. SHE IS POSING AGAINST THE PIANO AND WEARS A "COME HITHER" EXPRESSION. SHE HAS A ROSE IN HER MOUTH AND LOOKS BEAUTIFUL. | 12. ( <i>MUSIC: FADE BEHIND</i> )<br><i>ANNCR. (VOICE OVER):</i> if you're tired because of iron-poor blood, Geritol can help <i>you</i> feel stronger fast. |
| 13. CUT TO HUSBAND AS HE APPROACHES HE RUBS HANDS TOGETHER EXPECTANTLY.   | 13. ( <i>MUSIC: UP</i> )   |
| 14. CUT TO TWO-SHOT AS HE APPROACHES HIS WIFE. SHE GRABS HIM AND OVERPOWERS HIM WITH A KISS.  | 14. ( <i>MUSIC: FADE BEHIND</i> )<br><i>ANNCR. (VOICE OVER):</i> Maybe not <i>this</i> fast.   |
| 15. CUT TO PRODUCT SHOT. SUPER "FEEL STRONGER FAST"   | 15. But fast.<br>( <i>MUSIC: PLAYOFF</i> )   |

TITLE: "BOOK"  
 TIME: 40 Seconds

GERITOL COLOR TAPE  
 #G-543-40-ALT-REV.

(ANNOUNCE RE-RECORDING)  
 AT NATIONAL STUDIO-7/23/68

TV SCRIPT PARKSON ADVERTISING AGENCY, INC.

1. OPEN ON CLOSEUP OF TIRED WIFE LOOKING DESPERATELY UP TOWARD JUDGE.
2. CUT TO CLOSEUP OF JUDGE LEANING FORWARD, PARTLY IN SURPRISE, PARTLY IN SYMPATHY.
3. CUT TO HUSBAND PLEADING WITH JUDGE.
4. CUT BACK TO JUDGE, WHO IS HORRIFIED AND SHOWS IT. HE LEANS FORWARD TO REPEAT THE LINE IN UTTER DISMAY.
5. CUT TO TIRED WIFE AND SUPER: "TIRED WIFE"
6. CUT BACK TO JUDGE AS HE OPENS A LARGE BOOK, TURNS IT AROUND AND HOLDS IT TOWARD THEM. IN IT IS LETTERED: "TIRED DUE TO IRON-POOR BLOOD? TAKE GERITOL"
7. MOVE IN TO TIGHTER SHOT OF MESSAGE AS WIFE ALSO MOVES IN AND READS IT.
8. CUT TO WOMAN'S FEET GOING INTO STORE.
9. CUT TO HEAD SHOT OF WIFE AT GERITOL DISPLAY.
10. MOVE IN TIGHTER AS SHE "POURS" TWO GERITOL TABLETS INTO HER HAND.
1. *WIFE* (ON CAMERA): Judge, my husband doesn't pay any attention to me anymore!
2. *JUDGE* (ON CAMERA): Poor lady! . . .  
(To Husband) Well?
3. *HUSBAND* (ON CAMERA): I have Tired Wife!
4. *JUDGE* (ON CAMERA): Tired Wife!
5. (SOUND: GONG)  
*ANNCR.* (V.O.-ECHO): Tired . . . Wife!
6. *JUDGE* (ON CAMERA): Madame, I'm going to . . .
7. *JUDGE* (V.O.): . . . throw the book at you.  
WOMAN: GERITOL?!
8. *ANNCR.* (V.O.): The great majority of tired people don't feel that way because of iron-poor blood and Geritol won't help them . . .
9. but it's a medical fact millions of people have iron-poor blood . . .
10. . . . and you could be one of the many who are tired for that reason and need Geritol. Two Geritol tablets give you twice the iron in a pound of calf's liver plus seven vitamins.

- |  |  |
|--|--|
| 11. CUT BACK TO HAPPY HUSBAND AND WIFE WALKING BRISKLY DOWN AISLE OF COURTROOM TOWARD CAMERA. "LATER" IS SUPERED OVER. | 11. <i>ANNCR. (V.O.):</i> Geritol-iron enters your bloodstream fast, carrying strength . . . |
| 12. CUT TO WOMAN AS SHE APPROACHES JUDGE, STARTS TO OVERWHELM HIM WITH A KISS.   | 12. . . . throughout your body   |
| 13. SHE KISSES JUDGE. SUPER: "NO MORE TIRED WIFE."   | 13. <i>ANNCR. (V.O.-ECHO):</i> No . . . more . . . Tired . . . Wife!                         |
| 14. MOVE IN ON JUDGE WHO LOOKS AT CAMERA AS IF AN IDEA JUST STRUCK HIM.  | 14. <i>JUDGE (ON CAMERA):</i> Maybe my wife should take Geritol!                             |
| 15. CUT TO PACKAGE SHOT. SUPER: "FEEL STRONGER FAST."  | 15. <i>ANNCR. (V.O.):</i> Take Geritol— and feel stronger fast!                              |

TITLE: "ANSWER IS YES"

TIME: :30 Seconds

AS TAPED: 6/12/68 GERITOL COLOR TAPE  
AT VIDEOTAPE CENTER #G-206-30

TV SCRIPT PARKSON ADVERTISING AGENCY, INC.

- |  |  |
|--|--|
| 1. CLOSE UP OF RALPH BELLAMY.  | 1. <i>BELLAMY:</i> Have you ever asked yourself . . .  |
| 2. DISSOLVE TO TIRED LOOKING WOMAN.  | 2. <i>WOMAN (O.C.):</i> "Can iron-poor blood make me tired?"   |
| 3. CUT TO CU BELLAMY   | 3. <i>BELLAMY:</i> Yes!  |
| 4. CUT TO GERITOL BOTTLE   | 4. You may need Geritol.   |
| 5. CUT TO BELLAMY STARTING TO WALK.  | 5. The great majority of tired people don't feel that way because of iron-poor blood and Geritol won't help them . . . |
| 6. CONTINUES WALK AND STANDS NEXT TO GERITOL DISPLAY. HE INDICATES PRODUCTS. | 6. . . . but it's a medical fact, many of the millions of people who have iron-poor blood . . . are tired.             |
| 7. CUT TO GERITOL BOTTLES  | 7. and need Geritol. It could be why you're tired.   |
| 8. CUT TO BELLAMY  | 8. Geritol-iron enters your bloodstream carrying strength throughout your body.  |
| 9. CUT TO PRODUCT SHOT. MATTE SUPER: "FEEL STRONGER FAST"                    | 9. So, for iron-poor tired blood take Geritol<br><i>Feel Stronger Fast!</i>  |

## MAREMONT CORPORATION

*Docket 8763. Order, Dec. 20, 1968*

Order denying respondent's request to appeal from hearing examiner's order relative to the release of certain third-party documents.

ORDER DENYING REQUEST FOR PERMISSION TO FILE  
INTERLOCUTORY APPEAL

This matter is before the Commission upon respondent's request for leave to file an interlocutory appeal from the hearing examiner's order filed November 21, 1968, granting in part and denying in part respondent's motion for the release of confidential documents.

On October 21, 1968, after a prehearing conference, the hearing examiner filed an order which prohibited the release of certain third-party documents in the possession of complaint counsel to persons other than independent counsel for respondents. The examiner provided for the granting of relief from this ruling upon a proper showing by respondent's counsel. On October 23, 1968, respondent filed a motion requesting permission to release the third-party documents to four of its named employees. The hearing examiner's order of November 21, 1968, amended his order of October 21, 1968, in certain respects, but denied that part of respondent's motion which requested permission to release third-party data disclosing sales figures for certain automotive parts to respondent's four employees. It is this order which is the subject of the present motion.

At the outset, it is important to note that the examiner's orders do not purport to deal with the question of whether the third-party documents should be accorded *in camera* treatment. In his October 21, 1968, order, the examiner expressly denied third-party motions insofar as they sought to confer *in camera* status on their documents when offered in evidence.

The third-party data in issue consists of confidential business information which the third parties would not customarily make public. In this preliminary stage, the examiner was faced with the question whether the need for respondent's four employees to know this sensitive information outweighed the third parties' need for protection. In making his determination, the examiner made it clear on the record that this was not a final ruling but was an interim decision. Specifically, he suggested to respondent's counsel that he consult with complaint counsel or the third parties to resolve any difficulties in the comprehension or interpretation of the data. If difficulties could not be resolved, the examiner's

order of October 21, 1968, provides for further relief upon such showing by respondent. As pointed out in the examiner's order of November 21, 1968, respondent has failed to show that any effort has been made to establish the need for access to the data by respondent's four employees.

The fact that the examiner's rulings were not intended to foreclose this matter is further illustrated by his November 21, 1968, ruling in which he expressly provided for the disclosure to the four named employees of respondent, of any data, information or documents supplied by complaint counsel which reflect the methodology used in compiling statistics as to sales or in making adjustments in reported sales figures by the third parties.

In our interlocutory opinion in the *Koppers* case,<sup>1</sup> we reiterated our position that the hearing examiner has authority to create protective provisions based on the facts and circumstances of each case. The fact that the examiner has denied the third parties' requests for *in camera* treatment and has, in fact, modified his original position on the third-party data, establishes that in this posture of the case, the examiner's rulings were on an interim basis in an attempt to reach an equitable decision, and that such rulings are subject to further modification.

Under these circumstances, we find that the examiner, who is in close proximity to this case, has not abused his discretion.<sup>2</sup> It is our conclusion that a determination of the correctness of the examiner's rulings at the present stage, particularly because they are of such a tentative nature, is not essential to serve the interests of justice.<sup>3</sup> Accordingly,

*It is ordered,* That respondent's request for permission to file an interlocutory appeal, filed December 3, 1968, be, and it hereby is, denied.

By the Commission, with Commissioner MacIntyre concurring in the result.

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#### KOPPERS COMPANY, INC.

*Docket 8755. Order and Opinion, Dec. 24, 1968*

Order extending time for third party to comply with subpoena and denying motion to quash.

#### OPINION OF THE COMMISSION

This matter is before the Commission upon the motion of

<sup>1</sup> *Koppers Company, Inc.*, Docket No. 8755, November 1, 1968 [p. 1621 herein].

<sup>2</sup> *Lehigh Portland Cement Co.*, Docket No. 8680, August 2, 1968 [p. 1585 herein].

<sup>3</sup> Section 3.23 Commission's Rules of Practice.

United States Pipe and Foundry Company to extend the return date on the subpoena duces tecum issued at respondent's request, to a date no earlier than ten business days following receipt by U.S. Pipe of the Commission's order and opinion on its appeal from the examiner's order of December 3, 1968, modifying the subpoena and otherwise denying the motion to quash. In the same order, the examiner denied U.S. Pipe's motion for a stay of the return of the aforesaid subpoena except to the extent of postponing the return date to December 10, 1968.

The record reveals that on December 9, 1968, counsel for U.S. Pipe advised the examiner by phone that he had filed an appeal by mail from the examiner's order and would not appear at the December 10, 1968, prehearing conference. On December 10, 1968, the examiner certified the failure to respond to the subpoena as modified with the recommendation to the Commission that prompt action be taken to compel production under the subpoena. On December 11, 1968, the examiner certified the motion of U.S. Pipe to extend the return date of the subpoena with the recommendation that it be denied because it was for substantially the same relief previously denied by order dated December 4, 1968.

The record further reveals that on December 10, 1968, U.S. Pipe filed with the Commission (1) its application to extend the return date as described above and (2) its appeal and brief from the examiner's order denying the motion to quash.

The Commission is reluctant to intervene in this matter once again but feels that there are certain aspects of the proceeding which require it so to do. While the question of respondent's subpoena of the records of U.S. Pipe has been before the examiner and the Commission a number of times, what is of concern here is a new subpoena issued by the examiner pursuant to the Commission's opinion dated November 1, 1968 [p. 1621 herein]. Taking into account all the time factors involved, the subpoena in question was originally dated November 20, 1968, and was modified by oral order of the examiner dated December 3, 1968, at which time the date of return was extended until December 10, 1968.

Since the examiner also otherwise denied the motion to quash on the same date, it can thus be construed that the return date was set within the time during which Rule 3.35, as that time is computed under Rule 4.3, permits U.S. Pipe to appeal to the Commission from denial of the motion. The Commission has no wish to see this sort of cloud descend on these proceedings at



this stage, for if it denied U.S. Pipe's motion and took action at this time to compel production under the subpoena, a very real question would exist as to whether U.S. Pipe had, by construction of the Rules, been effectively denied its right of appeal.

While the Commission is, by the accompanying order, granting the motion by U.S. Pipe for an extension of time to respond to the subpoena, it does not agree that U.S. Pipe will need as much as ten days from the date of receipt of the Commission's order and opinion on its appeal from the denial of its motion to quash to do so. In view of all that has gone before, the Commission feels that U.S. Pipe should be prepared to proceed within five days following the Commission's action in the event the Commission decides to deny the appeal. The question would, of course, become moot if the Commission's decision was to grant the motion to quash.

Commissioner MacIntyre concurred in the result.

#### ORDER EXTENDING RETURN DATE ON SUBPOENA DUCES TECTUM

The Commission has given consideration to the application by United States Pipe and Foundry Company, filed December 10, 1968, to extend the return date on the subpoena duces tecum to a date no earlier than ten business days following receipt by the company of the Commission's order and opinion on the company's appeal, filed on the same day, from the hearing examiner's denial of the motion to quash said subpoena.

It appearing, for reasons stated in the accompanying opinion, that adequate justification exists for granting said motion in view of the time factors involved,

*It is ordered,* That the time allowed for the company to make return on the subpoena dated November 20, 1968, as modified December 3, 1968, be, and it hereby is, extended until five business days following receipt by the company of the Commission's order and opinion on the appeal from the examiner's order modifying the subpoena and otherwise denying the motion to quash.

By direction of the Commission with Commissioner MacIntyre concurring in the result.

1646

## ADVISORY OPINION DIGESTS\*

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### **No. 261. Promotional assistance based on percentage of purchases during a fixed time period.**

The Commission was requested to render an advisory opinion with respect to the legality of a supplier's proposed promotional program under an outstanding Commission order which, in pertinent part, prohibits the supplier from making promotional payments to its customers in a discriminatory manner. According to information provided by the supplier, all its sales are made to retailer customers—distributors or other intermediaries are not utilized in the distribution of the supplier's products.

Under the proposed program as set forth and explained by the supplier, promotional allowances would be made available to all customers of the supplier and could be applied by the customers to the costs incurred by them in three categories of advertising and promotional activity: Point-of-sale materials, cooperative advertising in daily and Sunday newspaper listed in Standard Rate and Data; and so-called other store promotions, including advertising in newspapers not listed in Standard Rate and Data, catalog and local radio and T.V. advertising, envelope stuffers, and sales incentive programs and contests.

Further, the amounts of such allowances would be determined at the rate of 7 percent of each participating customer's net purchases from the supplier in a six-month period, although this figure could be adjusted within any given trading area (defined by Management Survey of Metropolitan County Areas) as operating experience requires. In the case of Standard Rate and Data newspapers, the allowances could be applied to two-thirds the cost of such advertising, and for all other forms of eligible advertising and promotional activity, allowances could be applied to the full cost of the activity. In all cases, and whether any customer chooses to participate in any or all of said categories of advertising and promotional activity, the supplier's total contribution to the customer's cost would be subject to the 7 percent of purchases limit. Allowances earned but not used by any customer in a

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\* In conformity with policy of the Commission, advisory opinions are confidential and are not available to the public, only digests of advisory opinions are of public record. Digests of advisory opinions are currently published in the Federal Register.

six-month period could not be carried forward to the following such period.

Regarding the point-of-sale materials, the supplier would mail or deliver quantities of these materials to all customers, and each customer would be advised in advance that such point-of-sale materials would be charged against his available promotional and advertising allowances, unless returned to the supplier within 10 (ten) days of receipt, by mail or delivery to the supplier's salesman.

The supplier was advised that the proposed promotional program, if implemented in a nondiscriminatory manner, would not be in violation of the Commission's order or Section 2(d) of the Clayton Act.

The Commission cautioned that its opinion was predicated upon the supplier's assurance that all provisions of the proposed program, particularly that concerning the availability of cooperative advertising allowances for advertising in non-Standard Rate and Data newspapers, providing only that such newspapers have verifiable costs and circulation, and that concerning the return privilege regarding point-of-sale materials which would be mailed or delivered to the supplier's customers, would be effectively communicated to all customers of the supplier.

The Commission further cautioned that a customer who is located on the periphery of a particular trading area and who competes in fact with a customer located within such trading area, should be offered the particular promotional plan available to the customer within the trading area so as to preclude discrimination between customers competing in the resale of the supplier's products. (File No. C-1178, released July 2, 1968.) Issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).

**No. 262. Use of manufacturers' suggested retail prices accompanied by a disclaimer.**

The Commission was requested to render an advisory opinion as to the propriety of an advertisement referring to a product as "\$1.09 size, for 69¢" accompanied by a statement that "All regular prices are the manufacturers' suggested retail prices and are furnished here to help you identify the size being offered for sale."

The opinion advised that the answer to this question depended wholly upon whether or not the prices used as the basis for comparison complied with Guide III of the Guides Against Deceptive

Pricing, since, in the Commission's view, the use of the phrase "\$1.09 size" in the body of the advertisement and the reference to "manufacturers' suggested retail prices" in the statement place the representation in the category of a trade area price comparison. Therefore, the opinion added, unless the higher prices used do in fact represent the prices at which substantial sales are made by the principal retail outlets in the area, their use would be deceptive.

The Commission further stated that it was of the opinion that the capacity of such advertisements to deceive would not be relieved or removed by the statement or disclaimer proposed in situations where the prices used do not meet the test of the guides. At best, such a statement would simply render the advertisement ambiguous and leave it subject to two interpretations, one of which is false. It would still leave substantial numbers of consumers under the impression that the higher prices used were in fact the actual trade area prices within the meaning of the guides. (File No. 683 7136, released July 2, 1968.)

**No. 263. Lower price to "stocking" dealers.**

The Commission rendered an advisory opinion in which it said that it could not give its approval to a plan whereby manufacturers would give a lower price to "stocking" dealers who compete with "non-stocking" dealers. The opinion was given to a trade association which represents manufacturers of a household product.

As justification for the variance in the proposed pricing schedules, the association pointed out that "stocking" dealers experience a higher cost of doing business and therefore must sell at higher prices than their competing "non-stocking" dealers. It was also contended that such a price differential would stimulate the purchase of the product in question for inventory.

Expressing the view that it could not give its approval to such two price schedules if the "stocking" and "non-stocking" dealers compete and if the pricing differentials are of sufficient magnitude to adversely affect competition, the Commission concluded that the proposed plan could result in illegal price discrimination under Sec. 2(a) of the Clayton Act, as amended. In its opinion, the Commission went on to point out that such price differences would be illegal unless they could be justified on the basis of one of the specific defenses provided in Sections 2(a) and (b) of the statute.

"For example," the Commission said, "the law permits price differences which can be justified by provable cost differences in the manufacture, sale or delivery of such products resulting from

the differing methods or quantities in which the products are sold or delivered. Accordingly, Section 2(a) does not preclude prices reflecting less costly and, therefore, more efficient methods of distribution provided that the standards inherent in the statute's cost justification proviso are met."

Although the party seeking the advisory opinion did not raise the question, the Commission's opinion touched upon another point of interest in this type of a situation. Specifically, the Commission said:

\*\*\* it is conceivable that certain members may wish to compensate their customers for services which the customers may render for them in connection with the handling or resale of products manufactured by such members. The law provides a means by which this may be done, but if it is done, the manufacturer must comply the requirements of Section 2(d) of the Act. This requirement is simply that compensation for such services, if made by a manufacturer to one customer, must be made available on proportionally equal terms to other customers of that manufacturer who compete with the favored customer in the sale of the manufacturer's products. This means, among other things, that any plan or program, under which the payments are made must, if necessary, provide for alternative services or facilities which, as a practical matter, can be provided by all competing customers.

Concluding its opinion, the Commission cautioned as follows:

It should be noted, however, that payments by manufacturers to their customers "to stimulate the purchase of their goods for inventory," are not payments of the type contemplated by Section 2(d). Such a payment would merely be a reduction in price to induce the purchase of the manufacturer's goods and, if given to some but not all of the manufacturer's customers, might be unlawful price discrimination within the meaning of Section 2(a).

#### DISSENTING OPINION

JULY 9, 1968

BY ELMAN, *Commissioner*:

What is proposed here is that manufacturer members of a trade association will furnish compensation, in the form of a lower price, to those dealers who perform "stocking" services. A supplier may lawfully compensate his customers for services which promote more efficient distribution, so long as he satisfies the requirement of Section 2(d) of the Clayton Act that such compensation be available on a nondiscriminatory basis to other competing customers. The Commission's Guides for Compliance with Sections 2(d) and (e) (adopted May 19, 1960) indicate that the "services or facilities" covered by the statute are not limited to advertising and similar promotional activities but also include the furnishing of warehouse, showroom, and "stocking" services and facilities. It is also clear that compensation lawfully paid a cus-

tomer under Section 2(d) may, to simplify bookkeeping, be expressed in the form of a discount from invoice price. In such a case, if we look at substance rather than form, there is neither a price discrimination nor probable injury to competition, the two essential elements of a Section 2(a) violation.

If the lower price to dealers performing "stocking" services is *bona fide* compensation for the performance of distribution services desired by the manufacturer, and is available to all competing customers on a nondiscriminatory basis, it is lawful under Section 2(a) as well as 2(d) of the Clayton Act. In my view, the statute was not intended to prevent a manufacturer from obtaining distribution through as many functionally distinct channels as his business needs require. A *bona fide* functional discount or allowance to customers, offered and paid on a proportionally equal basis as compensation for warehousing and similar services rendered to the manufacturer, may increase efficiency, decrease costs, expand service to the consumer, and reduce prices. Such nondiscriminatory distribution methods promote competition, encourage innovation, benefit the consuming public, and thus advance the basic goals of the antitrust laws. To require identity of treatment of customers trading on different functional levels or rendering different distribution services is to foster economic discrimination—the very antithesis of "the central purpose of § 2(d) and the economic realities with which its framers were concerned." (*Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968).)

The Commission here imposes an unreasonable and impossible burden on suppliers in meeting the requirement of "availability." It declares that compensation may be given only for services or facilities which all competing customers can provide. In other words, if some of a supplier's customers cannot—for any reason, including their own inefficiency—provide services or facilities which a supplier needs to promote more economical distribution, he is barred from compensating other customers who are ready, willing, and able to furnish such services or facilities. By thus reading into the statute something which is not there, the Commission turns it topsy-turvy. The Commission says, in effect, that a manufacturer may not grant functional compensation to customers who earn it by rendering services he needs, unless he also gives the same compensation to other customers who do not earn it and render no services at all. Here again, neither Congress nor the courts can be blamed if, through administrative interpretation, the Robinson-Patman Act is converted into an anticompeti-

tion, antiefficiency, anticonsumer statute.

I agree with Commissioner Nicholson that the time has come for the majority of the Commission to reexamine its position.

#### DISSENTING OPINION

JULY 9, 1968

BY NICHOLSON, *Commissioner*:

I would not issue an advisory opinion in this matter since the Commission does not have sufficient facts to determine whether the applicant's proposed compensation of dealers, who provide stocking services, is inimical to the purposes of the Robinson-Patman Act.

The majority follows on a long line of Commission interpretations under which eligibility for functional discounts was solely related to the functional level of the buyer.<sup>1</sup> In all of these cases it could be said that a seller's reimbursement of a buyer for services also benefited him in the resale of the seller's product. However, whatever competitive disadvantage may be experienced by another buyer's failure to receive such compensation may be due not to a subterfuge by the seller to avoid the purposes of the Robinson-Patman Act but merely to the unpaid buyer's reluctance to innovate, to attempt marketing efficiencies, to engage in business risks, or to move with the times.

In none of these cases did the Commission carefully consider that its failure to permit compensation of the buyer for particular functions as a purchaser might hamper competition and efficiency in marketing, nor did it consider *the possibility* that its sole concern with the resale functional level of the buyer "compels affirmative discrimination *against* a substantial class of distributors, and hence serves as a penalty on integration."<sup>2</sup> In none of these matters did the Commission fully recognize that while, at one time, distinctions between the various distribution levels in American marketing had been clear-cut and the duties assigned to each level were rigidly defined, modern-day consumer needs and business response to such needs have resulted in a "proliferation of modern marketing units [which] defies neat nomenclature and descriptive labels."<sup>3</sup>

<sup>1</sup> See *e.g.*, *Agricultural Laboratories, Inc.*, 26 F.T.C. 296 (1938); *Albert L. Whiting*, 26 F.T.C. 312 (1938); *General Foods Corp.*, 52 F.T.C. 798 (1956); *Mueller Co. v. F.T.C.*, 323 F. 2d 44 (7th Cir. 1963); *National Parts Warehouse v. F.T.C.*, 346 F. 2d 311 (7th Cir. 1965); *Monroe Auto Equipment v. F.T.C.*, 347 F. 2d 401 (7th Cir. 1965); *Puroator Products, Inc. v. F.T.C.*, 352 F. 2d 874 (7th Cir. 1965).

<sup>2</sup> Report of the Attorney General's National Committee to Study the Antitrust Laws, 207 (1955).

<sup>3</sup> *Id.*, at 204.



The majority assumes that the proposed discount will amount to a violation of law. Commissioner Elman is certain that it will not. I will not make either assumption. We lack the facts necessary to make the analysis suggested above—an analysis so necessary to the proper application of a statute not meant to “penalize, shackle, or discourage efficiency, or to reward inefficiency.”<sup>4</sup> (File No. 683 7086, released July 9, 1968.)

#### No. 264. Stocking, quantity, and cumulative discounts.

The Commission rendered an advisory opinion to a manufacturer of food serving equipment which involved a proposal to use stocking, quantity and cumulative price discounts.

Under the first category, a discount of 50 percent and 15 percent would be given to stocking dealers who continually order in large quantities and maintain a regular stock of the product in question for local delivery to restaurants, hospitals, etc.

The second category involves the following quantity discount schedule to dealers based upon each order:

<i>Amount purchased:</i>	<i>Discount, percent</i>
1-11 dozen -----	50
11-24 dozen -----	50 and 5
25 and more dozen -----	50 and 10

Each dealer will receive the following additional cumulative volume discount at the end of each year based upon the total dollar volume of purchases for that year:

<i>Amount purchased:</i>	<i>Discount, percent</i>
\$1-\$3,499 -----	0
\$3,500-\$5,999 -----	1
\$6,000-\$8,499 -----	2
\$8,500-\$10,499 -----	3
\$11,000-\$14,999 -----	4
\$15,000-Up -----	5

Stocking dealers will be in competition with nonstocking dealers and nonstocking dealers will also compete with each other. Under the terms of the proposed pricing schedules, stocking dealers could get a price advantage of as much as 15 percent over nonstocking dealers, and nonstocking dealers could also receive up to a 15 percent price advantage over their nonstocking competitors.

After making a brief explanation of the requirements of Sec.

<sup>4</sup> H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936).

2(a) of the amended Clayton Act, the Commission advised the requesting party as follows:

It is, of course, impossible to reach a definitive conclusion as to the economic impact of such a pricing proposal without an investigation. However, the Commission has given your request careful consideration, and it has concluded that it cannot give its approval to the proposal because it believes that the necessary ingredients are present from which it can reasonably infer that such a proposal would likely result in the anticompetitive effects proscribed by the statute. A pricing schedule which results in a price advantage of as much as 15 percent under the facts outlined in this case would therefore probably be illegal, unless it can be justified by provable cost differences in the manufacture, sale or delivery of such products or unless the lower price is made in good faith to meet an equally low price of a competitor.

Commissioners ELMAN and NICHOLSON dissent from that part of the advisory opinion relating to discounts for stocking dealers. (File No. 683 7119, released July 9, 1968.)

**No. 265. Personal deodorant spray.**

The Commission rendered an advisory opinion to a manufacturer of a personal deodorant spray concerning the legality of some proposed advertising.

Specifically, the Commission advised the requesting party that the product was not a drug but a cosmetic, nor had it been cleared, approved or endorsed by the Food and Drug Administration. Therefore, any claims which represent the product as a drug, or that it has been cleared, approved or endorsed by the government agency in question would be improper.

Based upon all the facts and scientific information available to it, the Commission also advised the requesting party that any advertising representations which go beyond the claim that the product inhibits the growth of body odor causing bacteria would violate Sections 5 and 12 of the FTC Act.

Finally, the Commission stated that, as a general rule, it would be inclined to question the use of any claim that a product is "new" for a period of time longer than six months. (File No. 683 7004, released July 9, 1968.)

**No. 266. Magazine sponsored contest to win a house.**

The Commission rendered an advisory opinion advising a magazine publisher that there would be no objection to a proposal to give purchasers or readers the opportunity to participate in a contest to win a house if implemented in the manner outlined below.

The plan as presented was to give the reader, whether a pur-

chaser or not, the opportunity to participate in a competitive contest to win a house. The contestant was to send in a numbered coupon clipped from the magazine with a written answer of fifty words or less to a question as, for example, "Why do I believe in democracy?" The answer was to be judged by an independent panel, with the best essay being declared the winner. The contest was to take place every three months, at a prefixed date, in a public community event. The purpose of the number was to identify the contestant, with the judges knowing only the numbers of the participants and not their names. (File No. 683 7094, released July 17, 1968.)

**No. 267. Legality of describing green tourmaline as "Emerald Green Tourmaline" or "Precious Tourmaline."**

The Commission was requested to render an advisory opinion as to the legality of describing green tourmaline as "Emerald Green Tourmaline" or as "Precious Tourmaline." The stone involved in the request was said to contain chromium, the same coloring agent which produces emerald when it occurs in beryl, and the stone resembled emerald in appearance.

The Commission advised that it was of the opinion that the words "emerald" and "precious" may not be used in connection with the word "tourmaline" to describe the stone in question. (File No. 683 7124, released July 17, 1968.)

**No. 268. Agreement not to advertise prices.**

The Commission rendered an advisory opinion in which it stated that a joint agreement among competitors to refrain from price advertising would constitute a violation of Section 5 of the Federal Trade Commission Act.

The request which prompted the Commission's opinion stemmed from a proposal to use the following language in an association's standards of ethics: "Advertising of rates or comparison of competitor's rates or charges, is prohibited on the basis that such advertising demeans the profession."

The present code now in effect uses the word "discouraged" in lieu of the word "prohibited."

In ruling that such a provision would be illegal, the Commission said:

\*\*\* since price difference and price comparison may be valuable stimulants to competition, any agreement to suppress the advertising of the two would constitute an agreement in restraint of trade violative of Section 5 of the Federal Trade Commission Act.

Moreover, as to the present use of the word "discouraged" in the code

now in effect, you are informed that any agreement to "discourage" advertising of rates or rate comparison would also be in restraint of trade and violative of Section 5 of the Federal Trade Commission Act. The Commission is aware that you have not requested this advice, and indeed under the Commission's Rules an advisory opinion is usually considered inappropriate because the practice is one which is already engaged in; however, since your adoption of this rule has come to the attention of the Commission, the Commission would be remiss in not suggesting its discontinuance.

(File No. 683 7138, released July 17, 1968.)

**No. 269. Pooling of allowances for purposes of joint advertising.**

The Commission was requested to render an advisory opinion concerning the legality of a proposal by a group of independent retailers to pool the advertising allowances due the members for purposes of joint advertising.

Under the proposal, all money earned by the members under the suppliers' cooperative advertising programs would be assigned to the group in a collective advertising effort for the suppliers. Each supplier would receive, on the basis of the amount of money earned from him by all members of the group, radio advertising through the medium of three minute programs, each of which would have one minute of time available for the suppliers' commercial messages. The content of the one minute commercial would be governed by the suppliers themselves and would not be connected in any way with the retailers' advertising.

As part of the proposal, for each program a supplier receives the retailers would receive broadcast time on the same stations for their message, which would be institutional in nature and would extol the advantages of dealing with independent retailers. Under this type of advertising program, it would not be possible to mention individual dealers nor will prices be mentioned in such advertising.

The opinion advised that the Commission could see no objection to the proposal on the understanding that the fund used by or on behalf of the participating group to purchase advertising space will consist only of the aggregate of advertising allowances properly available to the members individually under the terms of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act. In brief, that Section prohibits the payment by sellers of allowances to some customers which are not made available on proportionally equal terms to all competing customers. In this connection, the opinion further advised that it would be unlawful if the combined power of the group was used to induce from the suppliers allowances greater than those to which the

individual members were entitled under this Section. (File No. 683 7147, released July 17, 1968.)

**No. 270. Necessity for disclosing country of origin of imported ski.**

The Commission was requested to render an advisory opinion as to the marking requirements applicable to a ski which is imported from abroad in an unfinished state and which would have to have the decal and the top finish applied in this country, as well as the final process for finishing the bottom or the running surface.

The opinion advised that in the Commission's view it will be necessary to disclose the country of origin of this ski in a clear and conspicuous manner to prospective purchasers at the point of sale. (File No. 683 7135, released July 17, 1968.)

**No. 271. Adoption of penalty clause which inhibits competitors.**

The Commission advised a requesting party that his proposal, if adopted, would violate Section 5 of the Federal Trade Commission Act.

The plan and its background were described as follows:

It is customary in the specified market for sellers of components furnished by a single supplier to offer free design services to architects and engineers engaged in planning new construction.

When the contracts are let, however, that seller of components who has provided the free design services is not always the successful bidder.

It was proposed, therefore, that the supplier contract and agree with all whom he supplies that a money penalty be imposed on any successful bidder who had not provided the free design services. The prescribed penalty would be paid over to that unsuccessful bidder who in fact provided free design services, failing which the supplier might at his option, cut the offending bidder off.

The Commission noted that any direct, or indirect, agreement between competitors which interferes with the free establishment of a market price whether that price be expressed in money, service, or in any other manner, is unlawful. (File No. 683 7137, released Aug. 17, 1968.)

**No. 272. Sales promotion plan—opportunity to buy at a savings.**

The Commission approved a proposed sales promotion plan described as follows:

The requesting party proposes to offer major oil companies its services in the promotion of the retail sale of gasoline. Partici-

pating gasoline stations will be provided with 3 x 4 cards picturing some product, most probably a nationally advertised appliance. These cards will be distributed gratis to those who wish to have them. No purchase of any kind will be required.

The appliance pictured on the card will be offered for sale at a price substantially less than the price at which it is ordinarily available through customary retail outlets. The holder of the card may obtain the appliance by sending the card with remittance to a designated Post Office box. His purchase will be mailed to him. A purchase may be made without a card if remittance is accompanied either by a facsimile of the appliance or a word description thereof.

The plan was approved on the assumption that the offered savings would in fact be available as prescribed in the Commission's Guides Against Deceptive Pricing. (File No. 683 7134, released Aug. 17, 1968.)

**No. 273. Publication by trade association of suggested resale price schedule for materials.**

The Commission rendered an advisory opinion advising a trade association of independent shops engaged in rendering repair service that its proposal to disseminate a suggested resale price schedule for materials used would be likely to result in a violation of law.

The schedule in question consisted of two tables, one of which gave the shop owner a quick reference to suggested resale prices for materials and the other of which gave him an explanation of the total by itemization of each resaleable product. The schedule explained that after hours of study it was found that computing labor and materials charges by allowing a price for each hour of labor was very unfair to the shops and far below their cost of materials. Hence the schedule gave the shop a quick method of computing the price of materials to which would be added the cost of labor.

The Commission advised that implementation of this proposal by the association would be likely to result in a violation of law. Even though couched in the form of a suggestion, the natural and probable result of such an action by the association would be to persuade substantial numbers of the members to charge the prices suggested, thus leaving an almost inescapable inference of an agreement among competitors to charge a uniform price for materials. Such an agreement, the Commission stated, would be a clear restraint of trade under existing law.

It was the opinion of the Commission that the prices charged by the members for materials should be determined by the natural forces of competition, not by concerted activity on the part of the members acting through their trade association or otherwise. (File No. 683 7148, released Aug. 17, 1968.)

**No. 274. Proposal to reduce discounts granted small volume purchasers.**

The Commission rendered an advisory opinion in which a distributor of leather specialty goods was informed that a proposed merchandising plan under which those customers whose annual purchase volume is less than an arbitrary and fixed amount would be granted a smaller discount than would be granted those whose purchases exceed such amount cannot be approved because it appears on its face to violate Section 2(a) of the amended Clayton Act if it were put into operation.

The proposed merchandising program will continue the current discount of 50 percent off list to those whose annual purchase volume exceeds \$250. All other accounts will be granted 40 percent discount on orders of less than \$200 list and 50 percent discount on orders over this amount until their cumulative purchase volume reaches \$500 list at which time each will receive a retroactive rebate adjustment on past purchases and the current discount on subsequent purchases. A service charge of \$2 is to be charged on orders of less than \$20 net.

The Commission further pointed out that price discriminations to customers who in fact compete with each other in the resale of commodities of like grade and quality would violate Section 2(a) of the amended Clayton Act unless cost justified or unless the lower price is a good faith meeting of a competitor's equally low price. (File No. 683 7146, released Aug. 17, 1968.)

**No. 275. Necessity for disclosing country of origin of imported watchbands.**

The Commission was requested to furnish an advisory opinion as to the necessity for disclosing the country or origin of watchbands which will be assembled in the Virgin Islands wholly from parts imported from Hong Kong.

The opinion advised that in the Commission's view the country of origin of these watchbands must be disclosed in a clear and conspicuous manner either on the bands themselves or on the packages in which they are sold. (File No. 683 7113, released Aug. 17, 1968.)

**No. 276. Disclosure of foreign assembly not required for product made of domestic components.**

The Commission advised a requesting party that in the absence of facts indicating actual deception disclosure of the foreign assembly of a product made of domestic components would not be required.

The domestic components accounted for approximately 90 percent of the manufacturing cost of the finished product; foreign assembly accounted for approximately 10 percent of the cost of the finished product. (File No. 683 7140, released Aug. 23, 1968.)

**No. 277. Formation of consumers savings group.**

The Commission was requested to render an advisory opinion as to the legality of a proposed method of organizing and operating a consumers savings group.

Under the facts as presented, certain select merchants in a town would agree to give designated cash savings to the members of the group upon the purchase of merchandise for cash, which would be a percentage of the purchase price. This savings would not be paid directly to the consumer at the time of purchase, but would be remitted to the group and held in reserve to be disbursed on a cyclical basis. The group would retain no portion of the member's savings, but would earn its profits solely from the fee charged for the consumer's membership in the group and from interest earned on the funds while they were being held for the consumers.

The Commission advised that it could see no objection to the operation of the group in the manner stated provided the purchase prices to be charged the consumer on which his percentage savings were to be computed were in fact the retailers' own former prices for the articles sold within the meaning of Guide I of the Guides Against Deceptive Pricing. In the Commission's view, the entire proposal was based on an assurance to consumers that they would save a stated percentage of the purchase prices actually paid and that those prices would be the regular prices customarily charged by the retailers or the prices at which the articles were openly and actively offered for sale in good faith for a reasonably substantial period of time in the recent, regular course of business. (File No. 683 7143, released Aug. 23, 1968.)

**No. 278. Commission approves proposed franchise agreement for chain of pizza and sandwich restaurant-carryout shops.**

The Commission issued an advisory opinion approving a pro-



posed franchise agreement between a trademark-trade name owner and individual operators of pizza and sandwich restaurant-carry-out shops.

Some of the important provisions of the agreement are the following:

1. Either the licensee or the licensor may submit to arbitration any question concerning agreement termination rights and obligations, including return to the licensee of all or any portion of the initial fee.
2. Licensor must make available for sale to licensee the foods, paper products and supplies necessary for conducting the business but licensee is not required to purchase them from licensor.
3. Licensor will prepare and place advertising directed to ultimate consumers in the general area of licensee's shop; licensee will provide the funds for such advertising; licensor will give licensee a quarterly accounting of the use of such funds.
4. Licensor may direct information other than price to go into signs and advertising.
5. The food sold and service provided must meet standards of quality set by licensor.
6. Licensee is not to operate a similar business for 2 years after termination of the agreement within 2 miles of his former shop. (File No. 683 7150, released Aug. 23, 1968.)

**No. 279. Commission advises agricultural cooperatives it has no objection to proposed purchase of country elevators of financially-troubled direct competitor.**

The Commission issued an advisory opinion to agricultural cooperative applicants who wish to acquire several country elevators of a financially-troubled direct competitor.

The applicants are a statewide federated agricultural association and affiliated local farmer cooperatives. Applicants, and the company with the operating plants sought to be acquired, purchase farm products from growers and resell the partially processed products to further processors, canners and other intermediate distributors. The state organization offers to help the financially-troubled company by furnishing technical assistance on a contract basis in the farm supply and commodity marketing area to help the company in continuing to be an important factor in a particular industry. Individual market shares of the cooperatives are reported to be small.

The Commission advised the applicants it has no objection to the proposed acquisition of some of the assets of the financially-

troubled competitor. (File No. 683 7154, released Aug. 27, 1968.)

**No. 280. Commission advised applicant it cannot approve a proposed partial acquisition of a direct competitor's business that may substantially increase applicant's market power.**

The Commission issued an advisory opinion to an applicant who sought premerger clearance to acquire a number of operating plants of a direct competitor.

According to the information submitted by the applicant, both companies purchase an agricultural product from growers and resell the partially processed product to further processors and canners. Both companies appear to be among the top four firms in the market and to have substantial shares of the market.

The Commission expressed the opinion that it cannot approve the proposed acquisition because such an acquisition may substantially increase applicant's market power and thereby tend to produce anticompetitive effects in violation of the Clayton Act, as amended. (File No. 683 7151, released Aug. 27, 1968.)

**No. 281. Trade association recommendations with respect to sales periods and services furnished by members and cash discounts by suppliers.**

The Commission rendered an advisory opinion to a trade association of clothing retailers that its proposal to hold discussions, conduct studies and make recommendations to its members and their suppliers with respect to three problems which confront the industry would probably be illegal.

The association advised that competitive conditions have forced the retailers into longer and longer sales periods which squeeze profit margins in the stores and contribute to improper merchandise assortments for one-third of the year. Second, it was stated that the cost of alterations was creeping upward as labor costs increase, thus adding to overhead expense and that only a limited number of stores charge for these alterations. Third, the association advised that manufacturers vary in the amounts of cash discounts they will give and in the time periods during which they will be allowed, thus confusing retailers and resulting in substantial clerical errors. The association felt that it would greatly simplify retailer record keeping if a uniform date of payment and uniform discount terms became an accepted practice in the industry.

In an effort to find solutions to these problems, the association contemplated three steps concerning which an opinion was de-

sired. First, it asked if it could include articles in its bulletins about the benefits of starting clearance sales at later dates and otherwise publishing information designed to show that stores better serve customers when they operate as a one price store for the maximum amount of time during the year. Second, it inquired as to whether it could include cost information on alterations showing the inequities of not applying reasonable charges for alterations and as to whether local merchants could discuss, without specifics as to price, the merit of charging for alterations and urge local cooperation. Third, the association inquired as to whether it could include in its publications information on the desirability of uniform cash discounts, pass resolutions and urge manufacturers to cooperate.

The opinion advised that all three of these proposed courses of action would, in the Commission's view, be of questionable propriety under existing law. With respect to the passage of resolutions urging manufacturers to adopt uniform cash discount terms, it was the Commission's opinion that, even if unaccompanied by any intent to force the manufacturers to adopt the policies set forth therein, there was implicit in such resolutions by the retailers too grave a danger that they would serve as a device whereby the concerted power of the members of the association was brought to bear to coerce the manufacturers to conform their discount policies to the restrictive standards of the resolutions, or, at the very least, as an invitation to enter into agreements among themselves to do so.

The other two proposals seemed to the Commission to involve activities by the association which would lead to suppression of competition among the members. In the Commission's view, the time and duration of sales and the furnishing of alterations without additional charge are methods of competition among the retailers. The natural and probable result of what the association proposed to do would be to limit competition in these areas and thus would constitute an unlawful restraint of trade. While the steps which the association contemplated may not be the equivalent of an agreement among the members to follow the recommended procedures, still if they had the effect of persuading substantial numbers of those members to do so, it would raise a serious inference of such an agreement and hence would be of questionable propriety under the antitrust laws. Therefore, any actions by the association which would have a tendency to bring about that result could not, the Commission stated, meet with its approval. (File No. 683 7141, released Aug. 27, 1968.)

**No. 282. Marking requirements for shirts assembled in the United States from foreign components.**

The Commission advised an apparel manufacturer that the Textile Fiber Products Identification Act would require an affirmative disclosure of the particulars of foreign origin under the following facts:

The manufacturer proposed to contract with or establish a plant in Hong Kong where foreign-made shirt cloth would be cut into parts and simple sewing would be done. The parts would then be shipped to a plant in the United States where, through a process of assembling, sewing and finishing of the cut parts, individual shirts would be manufactured. From the cost data furnished it appeared that 60 percent of the cost of labor would be performed in this country and 40 percent in Hong Kong. The material and labor furnished in Hong Kong would account for 61.5 percent of the total cost of finished shirts and the labor performed in the United States would account for 38.5 percent of the total.

The Commission advised that it was of the opinion that, under the laws it administers, textile products produced and processed in this manner must be labeled as "Assembled and sewn in the United States of materials imported from Hong Kong." (File No. 683 7158, released Aug. 27, 1968.)

**No. 283. Foreign origin—Container disclosure for contents of multiple foreign origin.**

The Commission advised a requesting party regarding information as to origin which should be set forth on a kit containing three domestic and eight foreign components from four different foreign countries.

Although the individual components are separately marked as to origin, this information is not readily available to a prospective purchaser at the time of purchase.

The Commission stated that a clear and conspicuous disclosure should be made on the container in the following terms, or in substantially equivalent terms:

"Some of the enclosed items are made in [countries] W, X, Y, and Z."

DISSENTING OPINION

AUGUST 31, 1968

BY ELMAN, *Commissioner*:

I would have granted the applicant's request that it be per-

mitted to mark the kit to read "domestic and foreign items enclosed." (File No. 683 7156, released Aug. 31, 1968.)

**No. 284. Location of foreign origin disclosure.**

In response to a request for an advisory opinion, the Commission announced it would be necessary to disclose the foreign country of origin of imported stainless steel flatware on the outer portion of the cover of the container.

Under the facts presented to it, the flatware will be properly marked as to its foreign country of origin on the underside of the handle when it is imported. Because of the manner in which the flatware will be repackaged in the United States, the foreign origin marking will not be seen by prospective purchasers through the cover of the container. Moreover, each container will be sealed with a plastic film wrapper thus making it virtually impossible to inspect the merchandise prior to the purchase thereof.

The specific question ruled upon by the Commission was whether it would be necessary to disclose the foreign origin on the outer portion of the container, in view of the fact that the disclosure on the flatware cannot be seen prior to the purchase of the merchandise.

In ruling that a meaningful disclosure would be required, the Commission said:

Whenever an affirmative disclosure of the foreign country of origin is required in order to prevent deception, the general rule is that the marking must be clear and conspicuous. This means that the disclosure must be placed in a location at the point of sale where it would be readily observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof. Under the facts described in your letter, the container normally would not be opened until after the purchase has been consummated. Since the disclosure of origin on the underside of the flatware cannot be seen through the cover of the container, the Commission is of the opinion that the disclosure will have to be made on the outer portion of the cover of the container in order to inform prospective purchasers of a material fact bearing upon their selection.

(File No. 683 7155, released Aug. 31, 1968.)

**No. 285. Formation of common marketing association by agricultural cooperatives.**

The Commission rendered an advisory opinion to the effect that it could see no objection to the formation by three agricultural cooperatives of a nonprofit marketing association.

While the marketing association was to be formed by the three cooperatives under state law, it was contemplated that any other producer of the same products could become a member. At the time, there were several other corporations which were not mar-

keting cooperatives but which were engaged in the production of the same products.

It was stated that the association would have no capital stock, would be a nonprofit cooperative organized for the mutual benefit of its members, membership would be restricted to producers who patronize the association, voting rights were to be equal and no member was to have more than one vote. Property rights were to be unequal and in proportion to the patronage of each member to the total patronage of all members with the association. It was further provided that the association would not market the products of nonmembers.

The proposed contract with the producers provided that the association would be the exclusive sales agent of the producers for the purpose of marketing their products. The Association could, under the contract, market or direct the marketing of all products produced by the producers in such manner and under such prices as it deems best. The association could designate authorized handlers to market the products of the members and the producers must market through these handlers. The producers themselves could execute a Handler's Contract and become authorized handlers.

The Handler's Contract between the association and all authorized handlers provided that the handler was to act as the hired sales agent for the association and was to be governed by the rules, regulations, orders and prices issued by the association. The handler agreed therein not to sell for less than the prices recommended by the association. The handlers could, under the contract, market other products for the producers and could handle products for nonmembers.

The opinion pointed out that the purpose of the Capper-Volstead Act (7 U.S.C. 291, 292) is to permit persons engaged in agricultural pursuits to associate in the collective marketing of their products. Under its provisions cooperative associations may make contracts or agreements as will effect such purpose and may have marketing agents in common. It has been construed as a grant of immunity from the antitrust laws insofar as collaboration among members of the cooperative associations are concerned. This immunity ends, however, at the point where they act, either by themselves or with other persons or entities not in this category, to restrain trade or otherwise eliminate competition at successive stages in the marketing process.

The opinion further advised that the Commission had considered the proposal and was of the opinion that formation of the

proposed marketing association by the three cooperatives would not result in violation of Commission administered statutes if implemented in the manner outlined. The Commission cautioned, however, that the opinion was limited to the formation of the proposed marketing association and was not to be construed as approval for any practice which may be predatory in nature, may result in unlawful monopolization, may restrain commerce to the extent that prices are unduly enhanced thereby, nor to conspiracies or combinations between the association and persons or entities not in this category. (File No. 683 7129, released Aug. 31, 1968.)

**No. 286. Foreign origin—Labeling requirements for tennis shoes made in Virgin Islands with foreign component.**

The Commission advised a requesting party that no disclosure need be made as to the presence of foreign made uppers used in the manufacture of tennis shoes in the Virgin Islands.

The uppers accounts for less than 30 percent of the total product value of the shoes and the other components are of domestic origin. (File No. 683 7139, released Aug. 31, 1968.)

**No. 287. Publication of advertising standards by private association.**

The Commission announced its approval of advertising standards proposed for publication by a private association.

The association has come to believe that a particular commodity is, in some instances, being locally advertised to the deception of consumers and the unfair disadvantage of competitors.

It therefore devised a statement setting forth a number of practices which have heretofore been found unlawful by the Commission and proposed to invite industry members voluntarily to agree to avoid such practices. It intends also to make its statement available to advertising media with a request that the media voluntarily use the standards set forth in the statement to screen proposed copy for acceptance.

The Commission stated that:

As long as each signer of the document agrees to, and abides by, its provisions without coercion, expressed or implied, and as long as each advertising medium exercises its own independent judgment, without coercion expressed or implied as to what copy it will accept or reject, the Commission would have no objection to your proposed document as written, or its proposed use.

(File No. 683 7159, released Sept. 6, 1968.)

**No. 288. Receipt of promotional allowances prohibited by order.**

The Commission was requested to render an advisory opinion with respect to the legality of a respondent's proposed participation in a special promotion sponsored by one of its suppliers. The respondent, a retailer, is under an outstanding Commission order which prohibits it from inducing and receiving promotional allowances when it knows or should know that the allowances are not made available on proportionally equal terms by the supplier to all its other customers in competition with the respondent.

According to information provided by the respondent, the supplier essentially has offered to pay 50 percent of the respondent's advertising space and/or time costs up to a maximum participation of \$5,000. Further, the Commission understands that the supplier has at least two other retailer customers in the respondent's trading area and that the supplier has represented to respondent that it will at some undisclosed future time offer the special promotion to each.

On the basis of this information, the Commission advised that whether respondent's proposed participation in the subject promotion will be in compliance with the order to cease and desist depends in large part upon the general availability of the said promotion, a threshold determination which must be made by the respondent.

The Commission advised that if the subject promotion is available to the other known customers of the supplier who compete with the respondent, no problem would seem to be presented by respondent's participation in the promotion. On the other hand, if respondent knows or, as a reasonable and prudent businessman, should know that the promotion is not available to such other known customers at such time as respondent would participate in the promotion (and the information before the Commission strongly suggests that this is the case), respondent's participation in the promotion would be in violation of the order.

Accordingly, the respondent was directed to inform the Commission of any determination it makes to participate in this promotion. (File No. C-1053, released Sept. 6, 1968.) (Issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

**No. 289. Compost peat.**

The Commission rendered an opinion to a company which sought permission to use the term "compost peat" as descriptive of organic, decomposed municipal refuse.



Ruling that it had no objection to use of the word "compost" since the end product is the result of decomposed organic matter, nevertheless the Commission reached a different conclusion with respect to the use of the word "peat."

In rejecting use of the word "peat" to describe the end product in question, the opinion stated:

The Commission believes that the purchasing public would generally understand "peat" to be a natural product, that is, one that is formed naturally where vegetable matter has decomposed over a long period of time under particular conditions. Peat moss is a common form of such natural product. The organic material produced in your decomposition process would not be "peat" as that term is so generally understood, and the Commission believes that to describe it as "peat" would be misleading. Accordingly, you are advised that the Commission would find your proposed use of the term objectionable.

Under the facts presented to it, the requesting party proposes to contract with various cities to handle their municipal refuse. All nonorganic material will be removed from such refuse and sold to various users thereof. The remaining organic material consisting of vegetable matter emanating from food and garden sources, grasses, leaves, trees, wood cellulose and other plants will then be processed under very high moisture conditions during the decomposition stage. Thereafter, the material will be held in large pits for seven days and then removed to storage sites for further decomposition. (File No. 693 7010, released Sept. 6, 1968.)

**No. 290. Membership in trade association by manufacturer under Commission order.**

The Commission rendered an advisory opinion to a beverage manufacturer, currently subject to a cease and desist order, covering the legality of a proposed reorganization of an industry association to which the manufacturer belongs.

Specifically the Commission was asked whether the manufacturer could properly sign the proposed articles of incorporation covering a state trade association, which is presently unincorporated and of which that manufacturer is now a member, where that manufacturer is covered by a Commission order prohibiting it from engaging in price fixing or engaging in any conversations with competitors regarding prices or terms of sale. The association's members are manufacturers and distributors of a product produced by the inquiring manufacturer. The proposed articles of incorporation state the purpose of the association to be to promote, represent and develop the industry within the state. In light of the foregoing circumstances, the Commission stated that

it had no objection to the signing of the proposed articles of incorporation by the inquiring manufacturer. (File No. D-8618, released Sept. 6, 1968.) (Issued under authority of Section 3.61 (c) of the Commission's Rules of Practice (1967).)

**No. 291. Commission refuses to grant blanket approval to small baking company to be acquired by anyone including corporations subject to Commission acquisition-prohibition orders.**

The Commission rendered an advisory opinion in response to a premerger clearance request from the owner of a small baking company who wants to sell the business to anyone including corporations subject to Commission cease and desist orders containing provisions prohibiting further acquisitions without prior Commission approval.

The applicant was advised by the Commission that it cannot grant the blanket approval requested. The Commission pointed out that corporations covered by Commission acquisition-prohibition orders are free, of course, to apply for prior approval to acquire the applicant's company in compliance with the order against the particular corporation.

From the data submitted by the applicant, it appears that, while the population had declined in its trading area and its sales have produced reduced revenues, the company has continued to operate profitably. No evidence was presented of any attempts to sell the business to any other independent baker or to anyone presently outside the baking industry. (File No. 693 7003, released Oct. 1, 1968.)

**No. 292. Paua shell being described as "marine opal."**

The Commission rendered an advisory opinion in which it concluded that costume jewelry containing a centerpiece consisting of a small inset of paua shell could not be described as "marine opal."

According to the Commission's opinion:

\*\*\* opal is a gem which is well known generally among the purchasing public and the trade and has certain well-established characteristics and properties. It is an inorganic mineral found in Australia which is far more expensive and preferable than the paua shell, which is an organic substance found in the ocean. Under these circumstances, therefore, the Commission has concluded that it would be deceptive to label a paua shell as "opal" on the well-established principle that the consumer is prejudiced if, upon giving an order for one thing, he is supplied with something else.

Commenting upon the inadequacy of the word "marine" to remove the deceptive nature of the word "opal," the Commission

said that the word "marine" would only serve to enhance that deception. It reached this conclusion because the word "marine" would convey the impression, contrary to fact, that this is a variety of opal found in the ocean, when in fact just the reverse is true, *i.e.*, opal is an inorganic mineral found in the ground. (File No. 693 7015, released Oct. 1, 1968.)

**No. 293. Commission declines ruling on use of term "humus," and states Peat Industry Trade Practice Rules apply if material comes within certain definitions.**

The Commission responded to a request for an advisory opinion (i) concerning the use of the term "humus" in proposed marketing of certain top soil material, and (ii) where there is anything in the proposed operation which is subject to Commission rules or regulations.

The application was made by a company which wants to market certain soil material as humus. The company submitted a partial analysis of the material as follows:

	<i>Marked—</i>		
	<i>Top 1'</i>	<i>3-4'</i>	<i>7-8'</i>
Water Holding capacity (percent) of its dry weight -----	950	906	916
pH -----	6.85	6.90	6.89
Moisture (percent) -----	82.2	87.5	83.8
Ash (percent dry basis) -----	6.8	12.4	9.0
Organic Content (percent dry basis) ---	93.2	87.6	91.0

The Commission noted that the analysis presented above does not indicate the amount or degree of decomposition of organic matter that may have taken place, nor the mineral content of the soil.

The Commission invited attention to this definition of humus in *Soil: The Yearbook of Agriculture (1957)*, prepared by the United States Department of Agriculture and published by the U.S. Government Printing Office (at page 759):

HUMUS—The well-decomposed, more or less stable part of the organic matter in mineral soils.

The Commission declined to express an opinion on the marketing of the material as humus because an informed decision on the proposed course of action or its effects could be made only after extensive investigation or testing; requests for opinions in this category are ordinarily considered inappropriate for Commission advice under Section 1.1(c) of the Commission's Procedures and Rules of Practice. Applicant also asked whether there is anything

in the proposed operation which comes under Commission rules or regulations.

Applicant was advised that the Commission's Trade Practice Rules for the Peat Industry, as promulgated January 13, 1950 (a copy of which was enclosed), apply to proposed operations if the material to be sold comes within the following definitions under such rules:

As used in these rules, the terms "industry product" and "peat" shall be understood as having the following meanings:

*Industry Product:* Any product marketed for use as a soil conditioner, or for any agricultural or horticultural purpose, which is composed, or is represented as being composed, wholly or in part of peat; also, any product marketed for any such purpose which is composed, or is represented as being composed, wholly or in part of a humus or muck derived from peat.

*Peat:* Any partly decomposed vegetable matter which is accumulated under water or in a water-saturated environment through decomposition of mosses, sedges, reeds, tules, trees, or other plants.

The Commission invited attention to the note appended to Rule 3, calling for the voluntary nondeceptive disclosure of the degree of decomposition, and principal uses of the product, as well as the acid and ash content, and moisture holding capacity. If this practice is observed, the likelihood of deception should be much reduced, the Commission commented.

With regard to the second question, the Commission again invoked Section 1.1(c) of its Procedures and Rules of Practice. An informed decision by the Commission on the presence of any peat, or of any humus or muck derived from peat, could not be made without extensive investigation or testing. Normal advisory opinion procedures do not provide for such testing or investigation. (File No. 693 7004, released Oct. 1, 1968.)

#### **No. 294. Advertising on food product wrapper.**

The Commission advised a food product manufacturer that it would not object to advertising proposed to be placed on the wrapper for the food product.

The advertising would offer to those who respond a money making opportunity in the form of premiums or payments for the sale of a specified product. An inquirer would incur no obligation upon receipt of the plan, or thereafter, and would be free to accept or reject it at will. Anyone performing under the offer would be recompensed according to a clearly disclosed scale for services rendered. No monetary investment would be required. (File No. 693 7011, released Oct. 8, 1968.)

**No. 295. Domestic origin marking on product containing foreign made components.**

The Commission responded to a request for an advisory opinion in regard to the following two questions:

1. What percentage of imported components may be used in the finished product (bearings) without the necessity of disclosing the foreign country or origin thereof?

2. Would it be proper to stamp the two types of bearings, which are partly made in a foreign country, as "Made in USA"?

Because the party seeking the opinion did not know the cost of the imported components in relation to the total cost of the finished product, the Commission said that the first question appeared to be somewhat hypothetical in that it does not involve a specific proposed course of action. Under these circumstances, the Commission concluded that the question was not the proper subject of an advisory opinion.

With respect to the second question, the Commission concluded as follows:

\*\*\* the "Made in USA" mark would constitute an affirmative representation that the bearings are made in their entirety in the United States. If the bearings did in fact contain foreign made components of a substantial nature, it would be improper to mark the finished product as "Made in USA" without a clear and conspicuous disclosure indicating the foreign country of origin of the imported components.

(File No. 693 7001, released Oct. 8, 1968.)

**No. 296. "Failing company" theory applied in Commission approval of sale of assets to a competitor.**

The Commission issued an advisory opinion granting premerger clearance for a company in imminent danger of dissolution to sell all or part of its assets to a direct competitor.

The selling company's financial affairs were in such state that it obviously would have ceased to be a competitive factor in its market in a matter of days. This being so, the Commission approved a sale to the only purchaser willing to, or in a position to, immediately salvage the assets. (File No. 693 7023, released Oct. 8, 1968.)

**No. 297. Premerger clearance—"Failing company"—portion of fixed assets to be sold to keep company in business.**

The Commission advised an applicant that it has no present intention to take any action if the proposed sale of certain fixed

assets to a direct competitor should be made, in view of the information submitted that:

(i) The (applicant) company is in critical financial condition and failing;

(ii) Efforts to find other purchasers have been unsuccessful, except that one other purchaser was found who wished to buy a smaller amount of the assets than ordinarily stated but who is not now in any position to buy any of the properties;

(iii) The proposed sale is expected to generate sufficient funds to meet outstanding debts and provide necessary working capital to continue the company as a going concern and an active competitor. (File No. 693 7030, released Oct. 8, 1968.)

**No. 298. Disclosure of origin of imported lenses finished domestically.**

The Commission rendered an advisory opinion as to whether certain glass filter lenses used on welding helmets could be described as "Made in U.S.A."

Under the facts presented to the Commission, the glass out of which the lenses are made is imported and upon arrival in the United States it is subject to further processing, such as cutting into special sizes, grinding of the edges, cleaning, polishing and labeling as to different shades of intensity and packaging.

In denying use of the "Made in U.S.A." mark on such a product, the Commission said:

\*\*\* a "Made in U.S.A." mark on the finished product would constitute an affirmative representation that the lenses are made in their entirety in the United States. Since the lenses are composed of imported glass, it would be improper to mark the finished product as "Made in U.S.A." without a clear and conspicuous disclosure indicating the foreign country of origin of the imported glass.

(File No. 693 7026, released Oct. 8, 1968.)

**No. 299. Disclosure of country of origin of repackaged goods imported in bulk.**

The Commission advised a requesting party that a product imported in bulk into the United States and thereafter broken and wrapped into a number of small packages and offered for sale to the general public should be clearly and conspicuously marked as to country of origin in such way as to be readily observable to a prospective purchaser on casual inspection.

CONCURRING OPINION  
OCTOBER 11, 1968

BY MACINTYRE, *Commissioner*:

The Commission's advice herein is in conformity with the public policy declared by Congress in 19 U.S. Code Sec. 1304. There it is required that any imported article or the container in which it is packed shall be marked in such manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of such article. The provision of law does not excuse the importer from penalties for violation thereof simply because the importer removed the imported article or articles from the original package and repacked the article or articles in new packages which failed to disclose the country of origin. The penalties for violation include fines of \$5000 or imprisonment for not more than one year, or both. It would be tragic for the Commission to issue any findings which would mislead any businessman regarding these requirements of the law.

DISSENTING OPINION  
OCTOBER 11, 1968

By ELMAN and JONES, *Commissioners*:

The Commission, in disregard of prior decisions and announced Statement of Policy, is applying a *per se* rule requiring disclosure of foreign origin of imported products. (File No. 693 7009, released Oct. 11, 1968.)

**No. 300. Contest and its advertising by retailer deemed objectionable.**

The Commission was requested to furnish an advisory opinion concerning a proposed contest and advertising pertaining to it.

The Commission observed that the proposed advertising is deceptive. Statements of the nature and value of the prizes are misleading. The proposed advertisement discloses little of the nature of the contest in which readers are invited to participate. The contest might expire at any moment.

On the basis of the facts as presented, the Commission concluded that the proposed advertising, if circulated, would be in violation of Section 5 of the Federal Trade Commission Act.

The Commission noted that the proposed contest is so intertwined with the proposed advertising that the plan as a whole, if implemented, would be in violation of law. (File No. 693 7031, released Oct. 11, 1968.)

**No. 301. "Danish" as applied to furniture.**

In amplification of Rule 7—Deception as to Origin—set forth in its Trade Practice Rules for the Household Furniture Industry, the Commission advised the requesting party as follows:

(1) "Danish," "Danish Modern" and like terms should be used only as to furniture produced entirely within the Kingdom of Denmark;

(2) "Danish designed" and like term should be used only as to furniture entirely designed or styled within the Kingdom of Denmark;

(3) "Danish style," "in the Danish manner," "after the Danish style," and like terms may be used to describe furniture manufactured other than in the Kingdom of Denmark provided such furniture has the characteristics of Danish design as understood by the general public. (File No. 693 7034, released Oct. 22, 1968.)

**No. 302. Promotional plan involving "cents off" coupons and demonstrators.**

The Commission rendered an advisory opinion to the promoter of a promotional plan involving the use of "cents-off" coupons which are to be given out by girl demonstrators in connection with the sale of items sold only in grocery stores.

Offered to all competing retailers in a selected trading area, irrespective of whether they buy directly or through wholesalers, the coupons will be valid only for the week that the promotion is in effect. Supplying as many demonstrators and coupons as may be necessary to meet the demand therefor, larger stores will have as many as 3 girl demonstrators giving out coupons in attendance for 3 days and smaller stores will have 1 or 2 girls in attendance for 1 or 2 days. Participating manufacturers will pay the promoter a certain sum per each demonstrator, plus the amount of the value of the redeemed coupons. Participating retailers will receive nothing of value other than demonstrator services, except reimbursement for the exact value of the coupons which they have redeemed. In addition to being given out by the demonstrators, the "cents-off" coupons will also be attached to the shelf in front of the product that is being promoted.

For those stores which find the basic plan is not suitable or usable in a practical business sense, the promoter will furnish without charge an alternate plan consisting of a prominent bulletin board announcing the plan to consumers. Placed in the most advantageous position in the store by the owner, the bulletin board will also have an adequate supply of "cents-off" coupons



attached thereto. In addition, coupons will also be attached to the shelf in front of each product being promoted, as in the case of the basic plan involving the use of demonstrators. If the retailer does not wish to use the bulletin board, he will be permitted to hand out the coupons as the customer passes by the cash register.

Notice of the availability of the basic and alternative plans will be made by (1) letter every six months to all wholesalers requesting them to notify their retail customers, (2) working with various trade associations on a continuous basis so that the associations will inform their members, (3) publishing ads every three months in two newspapers widely circulated among the trade, (4) letters sent to the buying offices of cooperatives and chain stores, and (5) use of the following statement printed on the back of each coupon: "For detailed information about this coupon call (promoter's name and telephone number)."

In the opinion, the Commission stated that the proposed promotional plan would not be in conformity with the law for the following two reasons:

First, Section 2(e) of the amended Clayton Act requires that promotional services be furnished to all competing purchasers on proportionally equal terms, if a promotional service is furnished to one purchaser. If the length of time for which the service is being furnished varies as between competing customers, the end result will be that some customers will be furnished services in a greater proportion than others. In essence, the law requires that the services which are being furnished must be offered for a specified period of time which is uniformly applicable to all competing customers. Under your proposed plan, some stores may be furnished the services of demonstrators for up to three days, whereas some competing stores will be supplied with such services for only one or two days. Because of this disparity in the amount of time during which demonstrators services will be furnished, the Commission believes that the plan does not comply with the required statutory proportionally equal treatment.

The second defect in the proposed plan relates to the following statement which appears on the face of the "cents-off" coupon: "Good Today Only—During Demonstration." According to the terms of the proposed plan, each coupon will be valid for one week. Therefore, the aforementioned statement which appears on the face of the coupon is misleading because it misrepresents the period of time during which one may take advantage of the alleged savings.

The opinion then pointed out that if the promoter decided to correct the two above-mentioned deficiencies, the Commission would withdraw its objection to the plan, provided the following two conditions are met.

First, as the promoter of this plan, you must make it clear to each supplier and each retailer that even though an intermediary is employed, it remains the supplier's responsibility to take all reasonable steps so that each

of the supplier's customers who compete with one another in reselling his products is offered either an opportunity to participate in the promotional assistance plan on proportionally equal terms or a suitable alternative if the customer is unable as a practical matter to participate in the plan; if not, the supplier, the retailer and the promoter participating in the plan may be acting in violation of Section 2(d) or (e) of the Clayton Act and/or Section 5 of the Federal Trade Commission Act.

Second, with respect to this matter of notification, you have outlined five methods which you expect to utilize. The Commission is withholding judgment as to the adequacy of the fifth method, namely, the use of a statement printed on the back of each coupon. It is doing so because it does not know how the retailer will get possession of this coupon and it believes that the statement itself is not sufficiently informative to apprise prospective retailers about the plan. But regardless of whether the stated methods of notification or other are used, the ultimate test is whether the plan has been effectively communicated to all competing customers at or about the same time within the selected marketing area and to those who, geographically, are located on the periphery of that area and in fact compete with the favored retailers.

(File No. 693 7018, released Oct. 22, 1968.)

**No. 303. Commission does not object to program employing data processing equipment to collect and disseminate actual production and sales information.\***

The Commission issued an advisory opinion telling an applicant it does not object to a proposed program to employ data processing equipment for the rapid collection and dissemination of actual production and sales information.

The program is to be made available to poultry processors. Individual identity of participants will not be revealed to others except in long-and-short emergencies. It is understood that such a situation exists when a processor finds he has insufficient supply of chickens (*i.e.*, he is "short") to fill the contractual obligation under a sales contract he has made; another supplier may have a surplus (*i.e.*, he is "long"); the proposed program, in these emergencies, would permit the short and long suppliers to communicate with each other through the data processing equipment. Only in such a situation would any participants learn each other's identity.

The proposal involves the collection and reporting of actual production and sales data rapidly; it will not deal with predictions by participants nor with asking, suggested or "future" prices.

The service is to be made available solely to poultry processors on a daily basis; poultry distributors, applicant says, are not in-

\* The Commission reconsidered this matter in light of *United States v. Container Corporation*, 393 U.S. 333 (1969), withdrawn by the Commission on January 22, 1970.

terested in participating. Other subscribers may receive weekly or monthly information summaries but not daily reports.

The Commission advised that it would have no objection to the proposal if implemented in the manner outlined in applicant's letter, but that this opinion is conditioned upon the submission, within nine months, of a full report indicating the manner in which the plan has worked in actual practice. (File No. 693 7042, released Oct. 22, 1968.)

**No. 304. Three-party promotional program under investigation.**

The Commission has been requested to render an advisory opinion to a supplier regarding the use of a tripartite promotion plan. The requesting party is subject to an outstanding cease and desist order prohibiting it from making promotional payments to its customers in a discriminatory manner.

The supplier sells its product through grocery, department, discount, hardware and other retail stores. The Commission advised the requesting supplier that it had instituted an investigation of the operation of the promoter's program and therefore was of the opinion that the request was inappropriate at this time. (File No. D-8175, released Oct. 22, 1968.) (Issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

**No. 305. Sales below cost provision in ethical advertising guide.**

In Advisory Opinion Digest No. 249, the Commission announced that a trade association's proposed "Guide to Ethical Advertising Practices" was unobjectionable save for its unqualified condemnation of advertising sales below cost.

The following revised sales below cost provision was subsequently found unobjectionable:

Members will not use below cost advertising as bait advertising. However, either merchandise or services or a combination of both may be offered below a member's total cost for limited period of time in close-out sales, stock reduction sales, promoting offers, provided such offers are truthfully and nondeceptively made and the member fully performs according to his offer.

(File No. 683 7097, released Nov. 18, 1968.)

**No. 306. Commission does not object to computerized inventory control system to be furnished suppliers by third-party promoter subject to certain safeguards for nonparticipating retailers.**

The Commission issued an advisory opinion concerning a computerized inventory control system to be furnished suppliers by a third-party promoter.

The promoter proposed to computerize sales data and project product inventory requirements for subscribing suppliers pursuant to information periodically obtained from participating retailers.

The Commission advised the applicant (the promoter) that, on the basis of the information submitted, the Commission does not object to the proposal subject to two safeguards for nonparticipating dealers: first, that the promoter satisfy the Commission that its subscribing suppliers "will continue to provide personal salesman service or some noncomputerized equivalent to those dealers who do not participate," and second, that suppliers "make the results of the computer analyses of sales trends and other general market information available to nonparticipants if and as they desire it." (File No. 693 7025, released Nov. 25, 1968.)

**No. 307. Foreign origin of cloth made into tablecloths in U.S.A.—permissible labeling—proposed trade name and trademark; Commission warnings.**

The Commission issued an advisory opinion concerning permissible labeling of tablecloths converted, dyed and finished in the United States from cloth imported in the greige from Japan, and to be sold in interstate commerce.

Submitted for Commission consideration was a label containing a proposed trade name and trademark. The trade name is a newly coined word composed of the term for the nationality of a particular European country, with a suffix. The trademark looks like a European heraldic design.

The Commission advised the applicant that, in its opinion, use in commerce of the proposed trade name and trademark for the tablecloths in question would probably amount to a deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act. The deception appears to be so pronounced, the Commission added, that it cannot be abated by qualifying words, "Made in U.S.A. of cloth imported from Japan."

Further, in the opinion of the Commission, Rule 34(b), 16 CFR § 303.34 (b), of the Commission's Rules and Regulations under the Textile Fiber Products Identification Act, applies because the form of the cloth is basically changed and therefore the country of origin (Japan) need not be disclosed. Commissioners Dixon and MacIntyre do not concur for the reason that this

advice appears to them to be erroneous. (File No. 693 7021, released Nov. 25, 1968.)

**No. 308. Commission does not object to proposed acquisition by dairy products producer-processor-distributor of another processor-distributor.**

The Commission issued an advisory opinion telling an applicant it does not object to a proposed merger on the basis of the information available at this time.

The applicant (Company A) is a dairy farmer cooperative association whose members own cows producing raw milk; applicant operates processing plants in one state and sells dairy products principally to independent home deliverymen in two states. The Company (Company B) to be acquired operates a processing plant in one state and sells dairy products to independent home deliverymen, grocery stores and institutions in two states. The processing plants of the two companies are not in the same state. Members of Company A presently supply about fifty percent of the raw milk needs of Company B and it is not anticipated that non-Company A members will be foreclosed as a result of the proposed merger.

Company A and Company B contend that the proposed combination will result in a stronger regional business entity to compete more effectively with integrated chain stores (having their own dairy facilities) and large national dairy companies in selling dairy products to consumers.

Commissioner MacIntyre did not participate in this matter. (File No. 693 7046, released Nov. 25, 1968.)

**No. 309. Inclusion of provision in cooperative advertising agreements limiting price advertising by retailers.**

The Commission rendered an advisory opinion regarding a proposal to include the following statement in cooperative advertising agreements to be drafted by the requesting party for use by manufacturer-clients for the purpose of placing a restriction on price advertising practices by their retailer-customers:

Dealer advertising will not qualify for cooperative reimbursement if it is featured at a price below the retailer's wholesale price (loss leader type) since such advertising tends to lower the quality image of the product in the consumer's mind.

The requesting party explained that this provision is intended to assist manufacturer-clients to protect the quality of their brand image through providing them with the means for limiting the

payment of promotional allowances to those retailer-customer advertisements which mention price at or above the retailer's wholesale price level. He took the position that such limitation would not affect any retailer's markup picture.

The Commission advised that the question posed does not readily lend itself to a categorical answer which, necessarily, would be affected by the facts surrounding any manufacturer-client's use of the restriction. Considering the various possibilities which may arise, the Commission is of the opinion, however, that it cannot give its approval to the use of such provision in any advertising allowance program which may be used on a continuing, year-round basis. In such program a manufacturer customarily offers to pay, on proportional terms, a fixed percentage of his customer's advertising costs at any time during the year. To incorporate such a restriction in that kind of promotional program would, in the Commission's view, have a tendency to fix or establish a permanent floor under resale prices which would be of questionable legality under the antitrust laws.

The Commission further pointed out that it does not see the same objection to the use of such provision in situations where the promotional offer is made on an infrequent or intermittent basis during the year. In such instances the offer is usually made for a special purpose, such as to stimulate off-season sales or at times during the year to fit in with an overall marketing program. In these situations, the Commission advised, it does not foresee the same restrictive effects on resale prices when a manufacturer, who is otherwise complying with the law, provides that he will not pay any part of the cost of advertising featuring a price below the retailer's wholesale cost.

It is, of course, assumed that the promotional advertising allowance offer will be made to all retailers irrespective of the prices that they have been charging at other times.

DISSENTING OPINION  
NOVEMBER 27, 1968

BY ELMAN, *Commissioner*:

In this advisory opinion the Commission holds that it is illegal *per se* for a manufacturer to include in a regular cooperative advertising program a provision that he will not reimburse a retailer for any advertisement featuring a loss-leader price below the wholesale price paid by the retailer. I emphasize the *per se* character of the ruling because these are the only facts before us. There is no indication whatsoever that the provision is part of a

scheme whereby the manufacturer seeks to fix prices or place a floor under resale prices, or restrict price competition at the retail level. On the contrary, it is clear that each retailer remains entirely free to sell, and to advertise, the product at as low a price as he wishes, including below cost.

The question is whether a manufacturer who believes that advertisements featuring below-cost retail prices damage him and degrade his product is nonetheless compelled to subsidize such advertisements by retailers. The manufacturer's position, simply stated, is that a retailer may sell and advertise the product at any price he wishes, but that if he chooses to advertise the product at a below-cost price, the manufacturer should not be required to pay for the ad. Is this an unreasonable position? The Commission's answer is that it is illegal *per se*, without more.

The implications of the Commission's ruling are startling. While below-cost selling is not in all circumstances illegal, it is not merely an unfair method of competition, it is a crime under Section 3 of the Robinson-Patman Act, to sell goods at below-cost prices for the purpose of destroying competition or eliminating a competitor. *United States v. National Dairy Corp.*, 372 U.S. 29 (1963).

The Commission holds today, however, that a retailer who engages in such illegal below-cost selling may require one of his principal victims, the manufacturer, to become an involuntary accessory to the crime. It holds that a manufacturer cannot engage in a regular cooperative advertising program unless he also agrees to subsidize the advertisements of even those retailers whose only interest in his product is to advertise it, for selfishly predatory purposes, as a below-cost "traffic builder." That such a ruling should emanate in 1968 from an agency of government supposedly concerned with the protection of competition and small business—and which continually disavows any hostility to cooperative advertising—is disconcerting, to say the least.

Commissioner MacIntyre did not participate for the reason that he considers both the advisory opinion and the dissent thereto to be so confusing as to render them not only valueless but also perhaps troublesome to the business community. (File No. 693 7045, released Nov. 27, 1968.)

**No. 310. Disclosure of country of origin of imported watchbands.**

The Commission was requested to furnish an advisory opinion as to the necessity for the disclosure of the country of origin of a watchband or watchcase which was attached to a watch in a

foreign country prior to importation into the United States.

The Commission advised that in its view the fact that watchcases are imported need not be disclosed and that the country of origin of a watchcase with a watchband permanently affixed thereto need not be disclosed, but that the country of origin of a metallic watchband of the detachable type must be disclosed. (File No. 693 7022, released Nov. 27, 1968.)

**No. 311. Origin disclosure of imported upper material used in shoes.**

The Commission rendered an advisory opinion to the supplier of certain synthetic fabric which is to be used in footwear as an upper material. The opinion dealt with various questions relating to the necessity to disclose the origin of the fabric, which is made wholly or in part in a foreign country.

Sold directly to shoe manufacturers, the material will be used in the manufacture of dress and casual shoes, including playtime or tennis shoes, but not work shoes or work boots. Under one method of production, the yarn would be extruded domestically but would be woven, dyed and backed in a foreign country. Such upper material made abroad would represent approximately 25 percent of total material costs for women's shoes and approximately 28 percent for men's shoes. Under the second contemplated method of production, the fabric will be made abroad in its entirety. Where the upper material is completely of foreign origin, it will represent approximately 35 percent-40 percent of total material costs for a pair of women's shoes and approximately 40 percent of total material costs for men's shoes.

In responding to the request for an advisory opinion, the Commission made the following general observations:

\*\*\* First, the Commission construes any affirmative representation that products are made in the U.S.A., as constituting an affirmative representation that the products are made in their entirety in this country unless there is a clear and conspicuous disclosure of the origin of the imported part or parts.

Further, in the absence of any affirmative misrepresentation as to origin, the Commission is of the opinion that, under the facts as presented, it will not be necessary to disclose the country of origin of the imported upper material.

Lastly, you have inquired as to whether disclosure would be required if the shoes are manufactured by a well-known American concern or bear a well-known American trademark. The answer to this question would depend upon whether, as a practical matter, the use of such name or trademark constitutes a representation of domestic origin. The Commission believes that each such case must be judged on its own merits in view of the surrounding facts and circumstances, and that no rule of general application can be announced.



(File No. 693 7033, released Nov. 27, 1968.)

**No. 312. Commission declined to approve proposed three party promotional plan in the food industry.**

The Commission issued an advisory opinion informing an applicant that his proposed three party promotional plan in the food industry would violate statutes administered by the Commission.

Under the plan, the promoter proposes to solicit sales of TV advertising time to suppliers of products retailed principally through grocery stores. The rates charged suppliers would be based exclusively on the television time furnished the supplier. In addition, each such supplier would receive the right to have its products promoted in the establishment of participating retailers.

Retail participation in the plan would be solicited by the promoter through invitations published in trade journals of general circulation to the retail trades. Retailers would participate in the plan by providing special in-store displays of products specified by suppliers who purchase advertising time on the promoter's programs and by agreeing with such suppliers to maintain during the period of the promotion a reasonable inventory of the products involved in the in-store promotion. The display obligation of each participating retailer would be geared to the participating retailer's facilities and the product or products to be displayed by that retailer. In return, participating retailers would obtain advertising on the promoter's television programs in accordance with a formula giving each participating retailer a minimum 10-second advertising spot on a television program during the specified period of promotion. Additional 10 second spots would be allowed on the basis of the retailer's purchases during an immediate prior period of suppliers' products covered by the promotional plan.

On the basis of the information submitted in connection with the application for an advisory opinion, it appeared to the Commission that the proposed arrangements for individual negotiations between suppliers and retailers with respect to display obligations of the retailers would probably violate Section 2(d) of the Clayton Act, as amended, and possibly Section 5 of the Federal Trade Commission Act. Furthermore, the plan made inadequate provision for informing the retailers of their opportunity to participate.

Commissioner Elman did not concur in the Commission's opinion. (File No. 693 7029, released Dec. 20, 1968.)

**No. 313. Marking of 18 karat white gold ring with platinum baguette prongs.**

The Commission rendered an advisory opinion in which it advised a ring manufacturer that it would be improper to place the following mark on rings composed of 18 karat white gold with platinum baguette prongs: "18K-Plat."

In rejecting the proposed mark, the Commission cited the following two reasons:

First, since the prongs of the center stone are made out of white gold which resembles the color of the platinum baguette prongs, prospective purchasers might believe that the center prongs as well as the baguette prongs are also made of platinum. Second, to the uninitiated prospective purchaser, the proposed mark, coupled with the similarity in color of the entire ring, might mean that the ring is made in its entirety out of platinum consisting of 18 karat fineness.

Similarly, the Commission also rejected two other proposed markings ("18K-10% Plat" and "90% 18K-10% Plat.") because they leave the consumer to speculate as to the exact part of the ring which is composed of platinum. Concluding that these two alternative suggestions are unacceptable, the Commission said:

Here, again, because of the similarity in color of the white gold and platinum the consumer might conclude that all of the prongs, including those for the center stone, are of platinum composition. Under these circumstances, it is not enough to merely say that the ring contains 10 percent platinum and 90 percent gold without disclosing the true composition of the various parts of the ring. In short, the Commission believes that the mark should clearly limit the platinum content to the baguette prongs and one possible suggestion would be as follows: '18K-baguette prongs Plat.' Any other language of equal clarity would, of course, be acceptable.

(File No. 693 7041, released Dec. 20, 1968.)