

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

ALTERMAN FOODS, INC.

Docket 8844. Order, Aug. 11, 1971

Order denying respondent's request to be heard on exceptions to hearing examiner's order denying respondent's motion for a more definite statement.

ORDER DENYING RESPONDENT'S REQUEST TO BE HEARD ON EXCEPTIONS

Respondent, on July 20, 1971, filed a document which it entitled as follows: "Exceptions To Ruling Of Hearing Examiner Edward Creel Denying Respondent's Motion For A More Definite Statement Or, In The Alternative, To Dismiss The Complaint."¹ Complaint counsel, on July 28, 1971, filed an answer in opposition to respondent's exceptions.

Respondent's document, while termed "exceptions," in fact urges the Commission to reconsider the hearing examiner's order and to grant the relief requested. Thus, it seems to be more in the nature of an appeal. The Commission's rules do not permit the filing of an interlocutory appeal from such ruling as this unless permission is first obtained from the Commission, and permission will not be granted except upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before the conclusion of the hearing is essential to serve the interests of justice (Section 3.23(a)). Respondent has not complied with this requirement of the Commission's rules and so it is not properly before the Commission in making its request.

Nevertheless, some general observations would seem to be in order. The examiner held, in effect, that the complaint is sufficient for the purpose of filing an answer. The Commission ordinarily will not disturb such a ruling and we see no reason to do so in this instance. Moreover, if it is discovery which respondent seeks, its rights are fully protected because the hearing examiner has scheduled a pre-

¹ It should be noted that the Commission's Rules of Practice do not require formal exception to an adverse ruling (Section 3.43(f)).

hearing conference for August 19, 1971, at which time or soon thereafter complaint counsel is to disclose his expected evidence. We conclude that respondent has not been prejudiced by the action taken herein. Accordingly,

It is ordered, That respondent's request to be heard on exceptions from the hearing examiner's order filed July 9, 1971 be, and it hereby is, denied.

MISSOURI PORTLAND CEMENT COMPANY

Docket 8783. Order, Aug. 23, 1971

Order denying various appeals by respondent and third parties from hearing examiner's rulings granting in part and denying in part motions of third parties to quash, limit or accord confidential treatment as to certain specifications in subpoenas *duces tecum*, and returning case to him for clarification of his ruling on specification 6.

ORDER DENYING INTERLOCUTORY APPEALS AND RETURNING MATTER TO THE EXAMINER FOR CLARIFICATION OF RULINGS REGARDING QUASHING OF SEPTEMBER 6

This matter having come before the Commission upon respondent's appeals, filed June 14, 1971, and July 6, 1971, from the hearing examiner's orders, filed June 7, 1971, and June 24, 1971, in which the examiner granted in part and denied in part the motions of third parties to quash, limit or accord confidential treatment as to certain specifications in subpoenas *duces tecum* issued at the instance of respondent; and upon answers in opposition filed by third parties on June 17, 1971, June 21, 1971, July 12, 1971, and July 16, 1971, and by complaint counsel on June 21, 1971, and July 13, 1971; and upon replies to certain of these answers filed by respondent on June 28, 1971; and upon the appeal of Ash Grove Cement Company and Fordyce Concrete, Inc., filed July 6, 1971, from the hearing examiner's order, filed June 24, 1971; and upon answer in opposition filed by complaint counsel on July 13, 1971; and

It appearing to the Commission that in all respects other than as to specification 6 in the said subpoenas *duces tecum* issued to certain cement manufacturers, no showing has been made as required by Rule 3.35(b) of the Commission's Rules of Practice to justify the above appeals; and

It further appearing to the Commission that the hearing examiner's orders quashing the said specification 6 do not sufficiently articulate his

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bases or reasons for such action, including whether he considered the requested data relevant for purposes of discovery; and

The Commission therefore having determined that the matter should be returned to the hearing examiner for clarification of his rulings as to the said specification 6 so as to afford the Commission a more informed basis for determination of respondent's appeals on this question, that respondent's appeals should be denied in all other respects, and that the appeal of Ash Grove Cement Company and Fordyce Concrete, Inc., should also be denied:

It is ordered, That respondent's appeals from the hearing examiner's orders filed June 7, 1971, and June 24, 1971, be, and they hereby are, denied insofar as they pertain to rulings of the examiner other than as to the said specification 6.

It is further ordered, That the appeal of Ash Grove Cement Company and Fordyce Concrete, Inc., from the hearing examiner's order filed June 24, 1971, be, and it hereby is, denied.

It is further ordered, That this matter be, and it hereby is, returned to the hearing examiner for clarification of his rulings as to the said specification 6.

Without the concurrence of Commissioner MacIntyre.

THE PAPERCRAFT CORPORATION

Docket 8779. Order, Sept. 9, 1971

Order denying respondent's petition for reopening and for a stay of the effective date of the final order; granting respondent's petition for leave to file a further statement; modifying Paragraph IX of the final order of June 30, 1971 (78 F.T.C. 1352); and otherwise denying respondent's petition for reconsideration.

ORDER OF THE COMMISSION RULING ON RESPONDENT'S PETITIONS FOR RECONSIDERATION, REOPENING, STAY OF FINAL ORDER, AND PETITION FOR LEAVE

Respondent Papercraft Corporation having filed on August 12, 1971, a Petition for Reconsideration of Paragraph IX of the Commission's final order of June 30, 1971, or for reopening under Sections 3.55, 3.71, and 3.72 of the Commission's rules, and for a stay of the effective date of that final order under Section 3.55; and counsel supporting the complaint having filed its opposition thereto on August 20, 1971; and respondent Papercraft Corporation having filed on September 2, 1971, a Petition for Leave to file a further pleading

in this proceeding; and counsel supporting the complaint having filed its opposition thereto on September 8, 1971; and

The Commission having determined that respondent's Petition for Leave should be granted and having considered the contents of said further pleading; and

The Commission having determined that respondent's Petition for Reconsideration is addressed solely to a question that was presented in complaint counsel's Proposed Findings of Fact of May 12, 1970 (pp. 60 and 69), and ruled upon by the hearing examiner in his initial decision of July 27, 1970, is not "confined to new questions raised by the decision or final order of the Commission" in its decision or order of June 30, 1971 [78 F.T.C. 1352, 1427], as required by Section 3.55 of the Commission's rules and therefore should be denied; and

The Commission having determined that respondent's Petition for Reopening and for a stay of the effective date of the final order should be denied; and

The Commission having determined that Paragraph IX of its order of June 30, 1971, should be revised to make clear that it applies to direct customer accounts of CPS Industries, Inc., and should be modified to apply only to customers sold by CPS during a two (2) year period preceding the acquisition of December 27, 1967, and until divestiture hereunder;

Now therefore, it is ordered, That Papercraft's Petition for Leave to file a further statement be, and it hereby is, granted;

It is further ordered, That Paragraph IX of the Commission's final order of June 30, 1971, be, and it hereby is, modified to read as follows:

It is further ordered, That for a period of three (3) years from the date of divestiture the Papercraft Corporation is prohibited from selling any decorative giftwrap products to any direct customer account of CPS Industries, Inc., which at any time during the two (2) years preceding December 27, 1967, and until divestiture is effected hereunder, has been sold any decorative giftwrap products by CPS Industries, Inc., unless such customer account was sold such decorative giftwrap products by the Papercraft Corporation prior to December 27, 1967.

It is further ordered, That respondent's Petition for Reconsideration be, and it hereby is, otherwise denied; and

It is further ordered, That respondent's Petition for Reopening and for Stay of the effective date of the Commission's final order of June 30, 1971, be, and they hereby are, denied.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order and Opinion, Sept. 23, 1971

Order denying the request of two of the respondents for an interlocutory appeal from hearing examiner's order denying their motion for an order dismissing Paragraph Seven of the complaint.

OPINION AND ORDER DENYING REQUEST FOR LEAVE TO FILE AN
INTERLOCUTORY APPEAL

Respondents, the Hearst Corporation and Periodical Publishers' Service Bureau, Inc., have requested leave to file an interlocutory appeal from the hearing examiner's August 10, 1971 order denying their motion for an order dismissing Paragraph Seven of the complaint.

On April 8, 1971, respondent International Magazine Service of the Mid-Atlantic, Inc. (IMS), filed with the examiner a motion to dismiss Paragraphs 4, 5, 6, and 7 of the complaint on the ground that the "matters covered therein are also the subject of an active, pending proceeding looking to the adoption of a trade regulation rule" concerning a cooling-off period in door-to-door sales, notice of which was published September 30, 1970 (35 Fed. Reg. 15164). The examiner certified this motion to the Commission pursuant to Section 2.33 of our Procedures and Rules of Practice. In the alternative, IMS moved that the adjudicative proceeding be stayed as a matter of administrative discretion pending disposition of the rulemaking proceeding.

We denied this motion to dismiss or stay by order issued May 26, 1971, pointing out *inter alia* that there was no overlap between Paragraphs 4, 5, and 6 of the instant complaint and the pending trade regulation rule. As to Paragraph 7, we noted that complaint counsel had made it quite clear during pretrial proceedings that this paragraph did not charge that gaining access to a potential customer's residence without prior invitation was itself an unlawful practice (Commission Opinion, May 26, 1971, Note p. 3 [78 F.T.C. 1588, 1590]). We also noted that the question of whether it is *per se* an unfair practice to fail to provide a right of cancellation in door-to-door sales is a major issue in the trade regulation rule proceeding and, therefore, to the extent this issue might be encompassed within the allegations of Paragraph 7, this issue was withdrawn from the complaint and Paragraph 7 modified *pro tanto*.

Respondents Hearst and Periodical have now also filed a motion seeking a dismissal of Paragraph 7 of the complaint. The hearing examiner denied this motion and respondents have requested leave to file an interlocutory appeal.

We believe that the examiner correctly denied this motion of respondents.

Respondents contend that the Commission, by its May 26 order modifying *pro tanto* Paragraph 7 of the complaint, withdrew from this adjudicative proceeding "all issues pertaining to the 72-hour cancellation right." We find no basis for respondents' contention. It is obvious that our May 26 order did not delete the entire paragraph but merely made clear that Paragraph 7 does not charge that failure to provide a cancellation right constitutes a *per se* violation of Section 5. It is also quite clear that the deceptive acts and practices which Paragraph 7 alleges respondents engaged in are not limited to this single issue of non-cancellable door-to-door sales transactions.

Respondents further contend that if the Commission does not dismiss Paragraph 7, they will be denied due process of law because the 72-hour cancellation right contained therein is the subject of trade regulation proceedings. A similar contention was considered and rejected by the Commission in its denial of IMS's April motion to dismiss, and respondents in the instant motion have presented no new contentions which would cause us to depart from our prior holding.

Accordingly, we find no basis for granting respondents' request for an interlocutory appeal from the examiner's denial of the instant motion and their request is, therefore, denied.

Chairman Kirkpatrick not participating.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order and Opinion, Oct. 29, 1971

Order denying the appeal of two respondents from hearing examiner's order denying their motion to dismiss the complaint.

OPINION OF THE COMMISSION

By JONES, *Commissioner*:

I

Respondents filed a motion with the hearing examiner seeking a dismissal of this complaint. The hearing examiner denied the motion and we granted respondents' request for an interlocutory appeal.

The grounds urged by respondents in support of their motion are essentially two: (1) that the Commission in issuing its complaint violated its own Procedures and Rules of Practice and (2) that counsel supporting the complaint will be relying on illegally obtained evidence

in the proof of the instant adjudicative proceeding and hence will be violating respondents' Fourth Amendment rights. (RB, pp. 3, 5-6).¹

The basis for both of these contentions by respondents rests on the circumstances surrounding the Commission's issuance of Advisory Opinion No. 128 [71 F.T.C. 1735; 16 C.F.R. § 15.128].² This Advisory Opinion was issued on May 22, 1967, at the request of these respondents and other members of the magazine subscription sales industry. It advised that the Commission found no illegality under the antitrust laws of the industry's proposed self-regulatory program designed to eliminate abuses in the sales practices of this industry.

Respondents argue that this opinion: (1) approved practices alleged as illegal in the instant complaint served on respondents on January 21, 1971; (2) committed the Commission not to institute adjudicative proceedings against these respondents while the advisory opinion was in effect; and (3) bound the Commission not to use any information received during the course of investigations in connection with the advisory opinion in any subsequent adjudicative proceedings brought against them. We will deal with these various contentions in the course of our consideration of respondents' two principal grounds for its appeal.

RESPONDENTS' CONTENTIONS THAT ISSUANCE OF THE COMPLAINT VIOLATES
COMMISSION PROCEDURES AND RULES OF PRACTICE

Respondents contend that the Commission's issuance of this complaint violated its own Section 1.3(b) of the Commission's Procedures and Rules of Practice and that, therefore, it must be dismissed in its entirety.

Section 1.3(b) of the Commission's Procedures and Rules of Practice provides that following issuance of an Advisory Opinion the Commission will not:

* * * proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval.

¹ RB refers to respondents' Interlocutory Appeal From Order Denying Motion to Dismiss Complaint (hereinafter cited as RB).

² The Advisory Opinion was conveyed to respondents' counsel in a letter from the Secretary of the Commission. Under then existing rules, the text of this letter was held confidential. A "digest" or paraphrase of the substance of the opinion was issued in a press release May 23, 1967. Respondents have placed the text of the letter on the record as Respondents' Exhibit 3 to the Deposition of Sidney Harris, submitted for consideration with this appeal (hereinafter cited as Harris Deposition). Accordingly, all references to and quotations from this opinion will be to the original text of the letter and not to the digest.

Respondents argue that all of the sales practices challenged in the instant complaint were either approved or permitted by the Commission's Advisory Opinion or were prohibited by their own industry self-regulatory Code which was approved by the Advisory Opinion. They argue further that in issuing its Advisory Opinion, the Commission expressly committed itself not to sue the respondents or other industry members subject to the Code for any of the practices which they claim were prohibited or permitted while the Code was in effect, and that, therefore, all of their activities were undertaken in reliance on this commitment and could not be challenged, until the Advisory Opinion was rescinded.

The answer to all of respondents' assertions, understandings and beliefs concerning the Advisory Opinion must be found squarely within the four corners of the industry request for a Commission Advisory Opinion and the text of the Commission's response. It is necessary, therefore, to examine this opinion in order to deal fully with respondents' contentions.

The Commission's opinion and the industry's original request show clearly that the magazine subscription sales industry came to the Commission for the express purpose of receiving an *antitrust* clearance for a self-regulatory program which the industry desired to institute in order to clean up its own sales practices in the solicitation and sale of magazine subscriptions.³

The Commission's Advisory Opinion stated unequivocally that with the modifications contained therein, the Commission believed the antitrust obstacles to the Code could be overcome and the Code approved so as to enable the industry to carry out its self-regulatory program. The Commission's opinion makes clear its almost total preoccupation with the antitrust problems which were raised by the industry's proposals to levy sanctions against Code violators.⁴ Thus the Commission's Advisory Opinion pointed out:

The Commission has given this matter very careful consideration in view of the magnitude of the problems which confront the industry and the obvious sincerity of the [PDS Agency] Committee in attempting to devise ways to cope with those

³ The industry's preoccupation with the antitrust implications of its self-regulatory program is borne out by the fact that originally it had gone to the Antitrust Division of the Department of Justice for a railroad release and had been referred by the division to the Federal Trade Commission. (See, letter, Zimmerman to Kintner, August 24, 1966, Ex. 7, Harris Deposition).

⁴ Indeed it was this precise issue of private police power which gave rise to Commissioner Elman's dissent. However, there is no doubt that even Commissioner Elman had no concept that in approving the self-regulatory program, the Commission was abdicating its own law enforcement responsibilities to the industry. See, for example, Chairman Weinberger's opening statement at the Commission's 1970 hearing concerning the operations of the PDS Code and Commissioner Elman's interchange with industry counsel on this precise point. See note 7 *infra* for citations.

problems. Even taking all these factors into consideration, however, the Commission is unable to give its approval to those sections of the Code which apply to the salesmen as those sections are now written. While the Code now provides that the action to be taken with respect to the salesmen found to be in violation would be on the basis of a recommendation by the Administrator rather than by agreement among the signatory agencies, the Commission believes the probable result of that recommendation would be to substantially interfere with those individuals' right of employment and their right to have their fate decided by their individual employers uninfluenced by virtually mandatory recommendations from the Administrator. However, the Commission does not believe that this would call for outright rejection of the Code, since *it is believed the Code can be amended so as to achieve the legitimate objectives of the Committee without running afoul of the antitrust laws.*

* * * * *

The Commission is further of the opinion, now that greater participation of the independent agencies has been insured, *that it is possible to apply the Code as now written to the publishers and agencies in such a manner as not to do violence to the antitrust laws*, particularly if the element of coercion can be truly eliminated insofar as the independent agencies are concerned when they are arriving at their decision as to whether to join or whether to remain under the Code after having joined. It should be made clear, however, that this conclusion is a tentative one since there is little recorded experience upon which to predicate such a judgment. Therefore, this opinion is based on the understanding that there will be no coercion of any agency to subscribe to the plan, no coercion of any agency to remain in it after it has subscribed and no retaliation of any kind against any agency which does not choose to join or which subsequently elects to leave after having joined. (Emphasis added)

Indeed the Commission was so concerned with the antitrust implications of the industry's assertion of sanction power over its members that it was reluctant to make its approval unconditional. Therefore, it advised the industry that its approval was limited to a trial period of three years and that during this period the industry was to provide it with detailed reports on the operations of the Code so that the Commission could observe for itself the way in which the Code enforcement provisions were actually implemented.

There is not the slightest indication either in the opinion or in the record before us on this motion that the Commission in approving the organization and enforcement machinery of the Code from an anti-trust viewpoint also granted clearance for any proposed types of selling practices or in any way surrendered any right or power to proceed against unfair or deceptive acts and practices engaged in by members of this industry. The industry's request clearly shows that no immunity from prosecution for selling practices was sought. Although the Commission's opinion noted that the proposed Code contained substantive provisions setting out the practices prohibited by the Code, the Commission observed that in its view these provisions merely at-

tempted to restate the substantive law respecting practices in the selling of magazine subscriptions and as such it had no objection to them.⁵ This clearly affords no basis for the contention that the Commission thereby "approved" any or all selling practices not specifically prohibited by the Code.⁶

Nor is there anything in the Commission opinion or the papers before us which indicates an intention on the part of the Commission to delegate exclusive policing authority to the industry. Not only did the Commission not surrender any such rights, it could not have done so legally. The Commission has no power to delegate even temporarily to private parties its statutory duties to enforce the law. It did not do so in this case.

Respondents suggest in their papers that their alleged understanding of the immunity purportedly granted to them by the Advisory Opinion was supported by statements made by members of the Commission and by its staff. We have no indication of what these statements might be, but in any event respondents' assertions on this point are legally and factually irrelevant.⁷ The Commission is a collegial

⁵ The sentences containing this observation in the Advisory Opinion read as follows:

It is noted that the Code incorporates a number of provisions which attempt to restate the substantive law applicable to this method of field selling of magazine subscriptions. The Commission herewith advises you that it sees no objection to these provisions as presently worded.

⁶ Respondents argue that Paragraphs 4(a), 5(a), 6(a), 6(e) and 7 of the complaint challenge practices which were permitted under the Code and that the Commission therefore approved of those practices. Aside from the fact that the Commission did not "approve" any selling practices, we have examined the Code and fail to find any indication that such practices are permitted. Indeed, the Code appears to prohibit the practices alleged in Paragraphs 4(a), 5(a), and 6(a). Paragraph 7 of the complaint has been modified subsequent to the issuance of the complaint so that it no longer asserts that failure to provide a 72-hour cooling-off period constitutes a *per se* violation of Section 5. See Commission Opinion, May 26, 1971.

⁷ Commissioner Elman in his dissent [71 F.T.C. 1738] from the Commission's decision to issue the Advisory Opinion deplored the fact that the Commission's Opinion permitted the industry to exercise what he termed the regulatory powers of government. But nothing in his statement can possibly be interpreted or implied to be a representation that in his view the Commission's opinion was allowing the industry to exercise any powers to the exclusion of the Commission's right and duty to do so. Again, there is simply nothing in this statement which could form any reasonable basis for respondents' present claims in this regard. See also Commissioner Elman's interchange with counsel for the industry during the public hearing on the operations of the PDS Code. *Infra* note 7.

The only other "statement" contained in respondents' appeal papers by a Commissioner or Commission staff members is an oblique reference in a letter by respondents' counsel to the Special PDS Agency Committee which requested the Advisory Opinion about a meeting he had had with then Commission Chairman Dixon in which counsel reported that Chairman Dixon intimated that complaints would issue against industry leaders unless the code "developed" into operation. (Letter, Kintner to Campbell, February 21, 1967, Ex. 13, Harris Deposition.) Whatever encouragement the Chairman reportedly gave to the industry to go forward with their own efforts to clean up abuses in their industry can hardly be translated by hindsight into a commitment or understanding given to respondents that approval of their self-regulatory program constituted a formal Commission commitment not to proceed adjudicatively against industry members prior to revocation or expiration of the Advisory Opinion.

body and can act officially only in its collegial form. No individual expressions on the part of Commissioners or staff can change one iota of the Commission's official actions as they are reflected by its response to this industry's request for an advisory opinion.⁸

It would be anomalous for a Commission, empowered and directed by Congress to initiate enforcement actions against unfair and deceptive acts and practices, to be stopped from such actions by the private expressions of staff members or even of individual Commissioners. This is not the law. Courts will not apply the principles of estoppel against government actions taken to protect the public interest. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *Utah Power and Light Co. v. United States*, 243 U.S. 389, 408-409 (1917); *Nichols and Co. v. Secretary of Agriculture*, 131 F. 2d 651, 658-659 (1st Cir. 1942); *SEC v. Torr*, 22 F. Supp. 602, 611-612 (S.D. N.Y. 1938); *L. B. Samford, Inc. v. United States*, 410 F. 2d 782, 788 (Ct. Cl. 1969); *Bornstein v. United States*, 345 F. 2d 558, 562 (Ct. Cl. 1965).

Our examination of the record presented on this motion has failed to indicate any factual or legal basis for respondents' contentions. Quite apart from the legality of any such grant of power as is claimed by respondents, if any such sweeping commitment to confer on an industry blanket immunity from prosecution was to have been granted, it would surely have been stated quite expressly and not be embodied in a respondents' "understanding" of what on its face was a very carefully worded advisory opinion discussing in painstaking detail the Commission's reactions to the industry proposal. It is inconceivable that if the Commission was in fact granting the industry the type of power which these respondents now claim that not a single word about it was included in the Commission's lengthy dis-

⁸ While we do not believe that statements made outside the text of the advisory opinion can in any way change the plain meaning of the opinion itself, it is of some relevance to respondents' assertions about statements of individual Commissioners, to note the statement of Chairman Weinberger made on behalf of the full Commission in the course of his opening statement in the public hearing which the Commission held at the request of these respondents and other industry members to consider the operations of the PDS Code.

[I]t is the Commission's view that industry efforts to[wards] self-regulation should in no way affect or limit the Commission's responsibility under Section V of the Federal Trade Commission Act to eliminate any deceptive or unfair practices that may exist in the industry, nor is it the purpose of this hearing to hear arguments on how the Commission can or should act to exercise its responsibility to protect the public interests. (Special Public Hearing in the Activities of Door-To-Door Magazine Subscription Sales Industry, March 10, 1971, p. 3.)

During the hearings, Commissioner Elman asked counsel for the industry association whether the PDS Code "repealed" any aspect of the Federal Trade Commission Act. (Id., p. 51.) Counsel for the association, who initiated the request for Advisory Opinion No. 128, responded in the negative. He characterized the relationship between the Commission and the industry as "a joint cooperative effort." (Id., p. 52.)

cussion of the legality of the industry proposal. We, therefore, conclude that respondents have failed to sustain their argument that the Commission's Advisory Opinion expressly or implicitly contained a commitment that industry members would be immune from prosecution under Section 5 of the Federal Trade Commission Act while the Advisory Opinion was in effect.⁹

RESPONDENTS' CONTENTION THAT THEIR FOURTH AMENDMENT
RIGHTS HAVE BEEN VIOLATED

Respondents' second argument in support of their motion to dismiss the instant complaint is also without factual or legal support. It, too, rests essentially on respondents' basic contentions with respect to the meaning of Advisory Opinion No. 128 and the commitments which they argue were given in connection with it.

Respondents state that part of the information complaint counsel will rely on to prove the allegations of the instant complaint was in fact provided voluntarily by respondents in response to Commission investigations of the administration of the PDS Code. Respondents contend that these documents were furnished to the Commission only pursuant to their agreement to do so under Advisory Opinion No. 128 and assert that they would not have cooperated in these investigations and would not have submitted this information had they been aware that the information would be used against them in an adjudicative proceeding. (RB, p. 6; respondents' Motion for Order Dismissing Complaint, p. 22) (hereinafter cited as RM). From this they argue that the use of any documents obtained by the Commission in connection with the PDS Code "constitutes the practical equivalent of using information obtained through a warrantless search and thereby a violation of the Fourth Amendment." (RB, p. 6)

Counsel supporting the complaint counter this argument with the statement that "any information developed [in support of the instant complaint] was still in response to a normal letter of access that precedes any investigation." (counsel supporting the complaint's Answer To Respondents' Interlocutory Appeal From Order Denying

⁹In view of our conclusion of this point, it is unnecessary for us to deal with the question of the date when the advisory opinion expired or with the argument of complaint counsel, accepted by the examiner, that whatever respondents' understanding as to commitments which might or might not have been given, the complaint filed against these respondents was served after the expiration of the advisory opinion by its own terms and hence respondents' argument must fall on this ground alone. We have no quarrel with the examiner's conclusion on this point but we have elected to treat the more fundamental issue raised by respondents because of its significance both to this part of respondents' motion to dismiss as well as to the second part of its motion to which we now turn.

Motion To Dismiss Complaint, p. 7, Ex. C) Respondents reply to this argument by pointing to proposed exhibits submitted by counsel supporting the complaint which bear stamps and signatures indicating that they were received by the Commission from an officer of one of the respondents several months prior to the date of the initial letter of access. (respondents' Reply To Answer to Request For Permission To File An Interlocutory Appeal From Order Denying Motion To Dismiss Complaint, pp. 2-5, Ex. C)¹⁰

The hearing examiner found "no indication" in the record before him that an illegal search had taken place. He noted that the Advisory Opinion notified the industry that it would be subject to careful Commission scrutiny. He noted that the Commission had not relinquished any of its powers to investigate the practices of the PDS Industry stating: "The Commission had the right and authority under the Advisory Opinion and the mandate of the Congress under the Federal Trade Commission Act to investigate these [PDS] complaints. The Commission so informed the respondents." (Hearing Examiner's Order Denying Motion to Dismiss Complaint, p. 6) We agree with the examiner's conclusion.

Respondents do not deny that under Advisory Opinion No. 128 they were required and agreed to provide the Commission with documentation as to the administration of their self-regulatory code.¹¹ Essentially respondents are arguing first that the Commission misled them into agreeing to provide this documentation concerning the administration of their self-regulatory code and second, that they were also misled into believing that the documentation which they supplied would not be used in any adjudicative proceeding.

Respondents acknowledge that the Commission investigators stated to them that they were requesting access to respondents' files in connection with investigations of the PDS Code. (respondents' Reply to Complaint Counsel's "Answer to Respondents' Motion for Order Dis-

¹⁰ Respondents also argued before the hearing examiner that the Commission could not use information obtained in connection with the PDS Code to lead to evidence to be used in adjudicative proceedings, citing the so-called "fruit of the poison tree" doctrine, *Wong Sun v. United States*, 371 U.S. 471 (1963), *Nardone v. United States*, 308 U.S. 338 (1939).

¹¹ The Advisory Opinion made the following provision with respect to the furnishing of information to the Commission:

[T]he Administrator or the Committee must submit reports to the Commission of each complaint which was received, considered or investigated and of each action taken by the Administrator. Further, the opinion is being rendered with instructions to the staff of the Commission to initiate periodic inquiries after the plan has been put into effect to determine and report to the Commission as to how it is actually working.

After this opinion was issued, the PDS Code Administrator made periodic submissions of documents to the Commission. The Commission staff initiated several investigations of PDS Code signatories and received from them various documents pertinent to their business operations.

missing Complaint, p. 3, Ex. A; respondents' Reply To Answer To Request For Permission To File An Interlocutory Appeal From Order Denying Motion To Dismiss Complaint, pp. 3-5, and Ex. A and B attached thereto). No misrepresentation, therefore, was made by these investigators as to the information they were seeking or the purpose of their requests. Since, as noted above, we have concluded that the Commission made no commitment to refrain from prosecuting industry members cooperating in the PDS self-regulatory program, we do not find that respondents were misled into agreeing to provide the Commission with documentation concerning the implementation of this program. Therefore, we do not find any wrongful or improper action on the part of the Commission in seeking respondents' disclosure of documents to the Commission.

We find equally unpersuasive the second prong of respondents' search and seizure argument that the Commission in some way committed itself not to use the documents received in the course of its monitoring of the PDS self-regulatory Code in any adjudicative proceeding.

Respondents were on notice of the fact that documents and information obtained by the Commission under any of its powers could be used against them in any adjudicative proceedings. Section 3.43(c) of our Procedures and Rules of Practice states:

Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceedings and may be offered in evidence by Counsel representing the Commission in any such proceedings.

Thus respondents were fully aware at all times that materials secured in investigations of the PDS Code could be used in adjudicative proceedings. If they had desired or received some contrary commitment with respect to these so-called PDS generated documents, it is quite evident that such a commitment would have had to be express and explicit. No such commitment is pointed to by respondents.

Respondents repeatedly assert that they have cooperated with Commission investigations of the PDS Code. They also assert, in an apparent effort to bolster their argument that the Commission misrepresented the use to which information obtained from them might be put, that members of the Commission staff commended them for their performance under the PDS Code.¹² We have no reason to question

¹² The Affidavit of John F. DeGroot, Ex. A to respondents' Reply to Complaint Counsel's "Answer to Respondents' Motion for Order Dismissing Complaint" discusses several occasions on which Commission staff members expressed commendatory opinions of respondents' operations. See, pp. 2-3 DeGroot Aff't. See also Harris Deposition, p. 59.

any of these assertions. But we do not believe they are relevant to the issues. Individual expressions by staff are in no way binding on the Commission. More important, they are hardly an equivalent to a waiver of the Commission's rules which govern the use to which documents furnished the Commission can be put. Finally, we cannot find in these statements any representation by our staff that the documents which were being sought would not be used in adjudicative proceedings.

Respondents, therefore, have not made out even a colorable claim that their Fourth Amendment rights will in any way be infringed by the Commission in the course of the instant adjudicative proceeding through use by counsel supporting the complaint of documents secured in the course of investigations of the PDS Code or submitted to the Commission by respondents in connection with the operations of that Code.

For the reasons stated above we deny the respondents' appeal from the hearing examiner's denial of their motion to dismiss the complaint.

Chairman Kirkpatrick did not participate in this matter, and Commissioner MacIntyre did not concur.

ORDER DENYING INTERLOCUTORY APPEAL FROM DENIAL OF MOTION
TO DISMISS COMPLAINT

Respondents the Hearst Corporation and Periodical Publishers' Service Bureau, Inc., having filed an interlocutory appeal from the hearing examiner's June 8, 1971 Order Denying Motion to Dismiss Complaint; and

The Commission having considered said appeal and the answer of counsel supporting the complaint thereto and having determined, in accordance with the views expressed in the accompanying opinion that respondents' appeal should be denied;

It is ordered, That respondents' appeal from the hearing examiner's June 8, 1971 order denying their motion to dismiss the complaint in this matter be, and the same hereby is, denied.

Chairman Kirkpatrick not participating, and Commissioner MacIntyre not concurring.

EATON YALE & TOWNE, INC.

Docket 8826. Order and Opinion, Nov. 11, 1971

Order denying third party appeal from the hearing examiner's protective order, and denying request of respondent for permission to appeal said protective order.

ORDER AND OPINION DENYING THIRD PARTY APPEAL AND DENYING
REQUEST OF RESPONDENT FOR PERMISSION TO APPEAL

This matter is before the Commission upon the filing August 5, 1971, of an appeal brief by a third party to this proceeding, General Motors Corporation (General Motors) entitled "General Motors' Appeal From Hearing Examiner's Order Directing Use and Disclosure of 6(b) Survey Data Without Application of Mississippi River Fuel Treatment" which appeal brief has reference to a protective order filed by the examiner July 27, 1971, complaint counsel's answer and respondent's answer thereto, both filed August 13, 1971; and upon respondent's request filed August 6, 1971, for permission to file interlocutory appeal from the hearing examiner's protective order filed July 27, 1971, and complaint counsel's answer thereto filed August 11, 1971.¹

I

General Motors has filed an appeal objecting to the hearing examiner's protective order filed July 27, 1971, contending (1) that its responses to a Section 6(b) survey, a survey assertedly made for investigatory purposes, cannot later be used in specific litigation, and (2) that if the material in such responses is so used it should be accorded the so-called "Mississippi River" treatment. General Motors claims a right to appeal pursuant to Section 3.35(b) of the Commission's Rules of Practice, but complaint counsel has questioned whether it has standing to appeal under this section of the Commission's rules. Section 3.35(b) concerns generally appeals from rulings on applications for compulsory process. The issue here does not concern such as application but, rather, the use in adjudication of material in the Commission's files obtained in a special report filed with the Commission in connection with a survey under Section 6(b) of the Federal Trade Commission Act.²

Notwithstanding the lack of a specific provision for appeal, particular circumstances in this case have convinced us that we should here consider General Motors' objections. The record is not wholly clear on the details, but it seems that complaint counsel, on or about April 9, 1971, advised General Motors, as well as thirty-three or so other reporting companies involved in the 1968 6(b) survey, that they pro-

¹ The Commission, on August 12, 1971, issued an order staying the protective order of the hearing examiner filed July 27, 1971, until "further order of the Commission."

² The Commission, on May 14, 1968, issued a resolution entitled: "Resolution Directing An Investigation Into the Acts and Practices of Companies Manufacturing Automotive Parts, Accessories and Equipment." Under this resolution orders requiring the filing of special reports were mailed to a number of manufacturers, including General Motors. General Motors furnished certain data to the Commission in response to this demand.

posed to use in this adjudication certain information furnished to the Commission in that survey. The notices apparently were sent out at the behest of respondent's counsel (Tr. 69), who sought access to the data for the purpose of preparing respondent's defense.

The notice letter which complaint counsel sent to General Motors is quoted verbatim in the record (Tr. 71-73). Therein it is noted that the hearing examiner indicated he would issue a protective order restricting access to the data in question to respondent's legal counsel, consulting economist and company officials as necessary in the preparation of its defense. Complaint counsel further states in the letter, among other things, that if General Motors would prefer a different kind of order than the one proposed by the hearing examiner or if it desires other limits on disclosure, it should "file an appropriate motion under Commission Rule 3.45 and appear before Judge Buttle at the prehearing conference scheduled for April 30."

Subsequently, General Motors made an appearance, through its attorneys, at the pretrial conference held April 30, 1971. At that time General Motors was given the opportunity to present its position. General Motors on May 17, 1971, additionally filed a memorandum of its opposition to the use of the 6(b) data. It argued substantially the same points it makes in its appeal brief now before the Commission.

The hearing examiner ultimately resolved the question by issuing, on July 27, 1971, a protective order governing the use of the 6(b) survey data here in controversy, including that which has been supplied by General Motors.³ This order provides that complaint counsel make a certain limited disclosure of the 6(b) material, specifying that it shall be released only to "independent counsel (excluding house counsel) and/or independent economist of respondent, who shall protect and maintain the confidentiality of such information and shall not reveal the contents thereof to anyone other than members of independent counsel's law firm or attorneys actively employed in this litigation * * *." A further feature of the order among others is a provision that if any of the information is offered in evidence it shall be accepted subject to an appropriate *in camera* order.

It is from this protective order that General Motors has filed an appeal. As stated, we believe the circumstances justify its consideration by the Commission.

³ Previously the examiner, on June 29, 1971, certified to the Commission a question on whether or not the so-called "Mississippi River" confidentiality treatment should be used. The Commission by order issued July 13, 1971, remanded the matter back to the examiner holding that the question should be at least initially answered by the examiner. Thereafter, the examiner issued his protective order which in effect denied General Motors' request that the material not be used in the adjudication and its alternative request that, if used, the "Mississippi River" treatment be applied.