EXHIBIT A

U. S. CONSUMER PRODUCT SAFETY COMMISSION
Washington, D. C.

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CONSUMER PRODUCT
SAFETY COMMISSION

In the matter of

WHITE CONSOLIDATED INDUSTRIES, INC.,
a corporation, doing business as
KELVINATOR, INC.
a wholly owned subsidiary, and as
G.R. MANUFACTURING CO.,
and
EDWARD S. REDDIG,
individually and as an officer of
WHITE CONSOLIDATED INDUSTRIES, INC. and
KELVINATOR, INC., and
THOMAS I. DOLAN,
individually and as an officer of
KELVINATOR, INC., and
ROY H. HOLDT.
as an officer of WHITE CONSOLIDATED
INDUSTRIES, INC.

Respondents

CPSC DOCKET

NO. 75-1

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FOR
THE INITIAL DECISION

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Dec. 3, 1975 This Initial Decision became the decision of the Commission by operation of 16 CFR 1025.71 (The Proposed and Interim Rules of Practice for Adjudicative Proceedings).

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U.S. CONSUMER PRODUCT SAFETY COMMISSION
Washington, D. C.

In the matter of WHITE CONSOLIDATED INDUSTRIES, INC., a corporation, doing business as KELVINATOR, INC., a wholly owned subsidiary, and as G.R. MANUFACTURING CO., and EDWARD S. REDDIG, individually and as an officer of WHITE CONSOLIDATED INDUSTRIES, INC. and KELVINATOR, INC., and THOMAS I. DOLAN, individually and as an officer of KELVINATOR, INC., and ROY H. HOLDT. as an officer of WHITE CONSOLIDATED INDUSTRIES, INC. Respondents	CPSC DOCKET NO. 75-1

INITIAL DECISION

Introduction

By Notice of Enforcement issued by the U.S. Consumer Product Safety Commission on March 10, 1975, Respondents were informed of the Commission Staff's opinion that "approximately 336,000" refrigerators manufactured by Respondents from late 1970 through early 1974 presented a "substantial product hazard" within the meaning of Section 15(a) (2) of the Consumer Product Safety Act (15 U.S.C. §2064(a)(2)) because the Staff believed that certain design defects in those refrigerators could cause fire and resultant injury. The Staff urged that Respondents be

ordered by the Commission to notify the public, in general, and the purchasers of these refrigerators, in particular, of this substantial product hazard, and further, that Respondents be required by the Commission to elect to repair, replace, or refund the purchase price of the affected refrigerator models, as provided for in Sections 15 (c) and (d) of the Consumer Product Safety Act (15 U.S.C. §2064(c), (d)). 1/ Attached to the Notice of Enforcement were the principle items of written evidence which the Commission Staff considered to constitute a prima facie case, and, in conformity with Commission's Rules of Practice, 2/ the form of Order which the Staff believed should issue if the facts were found to be as alleged in the Notice of Enforcement.

Respondents filed their Answer to the Notice of Enforcement on March 31, 1975. (Docket #2). 3/ On April 28, 1975, the

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1/ The text of Section 15 of the Act is reproduced in the Appendix.

2/ In accordance with Section 15(f) of the Consumer Product Safety Act, 15 U.S.C. 2064(f), such an Order may be issued only after an opportunity for a hearing generally in accordance with Section 554 of the Administrative Procedure Act, 5. U.S.C. §554. The Commission has published Proposed and Interim Rules of Practice for such adjudicatory hearings. See 39 F.R. 26848 (July 23, 1974) (hereinafter "Rules of Practice").

3/ The "Official Docket" in this case is maintained under the authority of the Office of the Commission's Chief (and currently sole) Administrative Law Judge in the Commission Secretary's Office, 1750 K Street, N. W., Washington, D.C. 20207. See Rules of Practice, Section 1025.23. It is available for public inspection. "Docket #2" refers to the second document in the official docket listing on file in this case.

Commission formally designated Commissioner Constance B. Newman as Presiding Officer in this case. (Docket #3). That same day, the Presiding Officer issued a Notice of Prehearing Conference to be held on May 16, 1975. 4/ That Prehearing Conference Notice summarized the factual allegations in the Notice of Enforcement, announced the Presiding Officer's preliminary decisions to convene a full hearing in this case, if necessary, no later than June 2, 1975, and to make liberal use of written direct testimony prepared and served in advance of the full hearing, and invited all interested persons to participate in the prehearing conference or testify at the hearing. 5/

At the Prehearing Conference of May 16, 1975, at which Respondents appeared through counsel, motions were filed and taken under advisement pending further briefing, no intervenors came forward, issues in the proceeding were discussed, and a schedule was established. 6/ A Prehearing

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4/ The Notice of Prehearing Conference (Docket #6), prepared by the Presiding Officer, was published in the Federal Register on May 2, 1975 (40 F.R. 19233), and referred to in the Commission's weekly Public Calendars of that period.

5/ Two full weeks between the publication of the Federal Register announcement of the Prehearing Conference and the Conference itself was deemed an adequate period for third parties to reach a decision about the possibility of their participation in this case without unduly delaying a full hearing on the serious Staff allegations about the substantial product hazard posed by Respondents' products.

6/ Tr. of the Prehearing Conference (Docket #24).

reasons discussed in detail below, that the refrigerators specified in the Commission's Notice of Enforcement do not present a substantial product hazard within the meaning of Section 15(a) (2) of the Consumer Product Safety Act. Accordingly, an Order entering judgment in favor of Respondents and dismissing the Notice of Enforcement is appended hereto.

Preliminary Legal Matters

The parties have raised a number of difficult and important legal questions throughout the course of this proceeding, only some of which have been decided by the Presiding Officer to date. Before turning to the merits of the controversy, these questions and their resolution are discussed below.

(a) Objections to the Presiding Officer

On April 29, 1975, the day following the designation by the Commission of the Presiding Officer, Respondents filed an objection to a Commissioner being so designated urging that such a procedure deprived them of a fair hearing and constitutional due process, and violated the Administrative Procedure Act, 5 U.S.C. §§ 551-59 (A.P.A.). Respondents urged the full Commission to defer all proceedings in this case until an Administrative Law Judge, instead of a Commissioner, became available to act as Presiding Officer. On May 1, 1975, Chairman Simpson, then Vice-Chairman Kushner, and Commissioners Franklin and Pittle, in accordance with Section 1025.62 (e)(2)

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of the Rules of Practice, permitted the Presiding Officer ten days to reply to Respondents' objection prior to their decision. (Docket #5).

In her Reply, the Presiding Officer, noting that her participation in this case as a Commissioner prior to her designation as Presiding Officer was limited to her approval on the basis of written briefing packages of the issuance of a Notice of Enforcement, declined to play any role in any Commission decision on any interlocutory or other appeals from any ruling or decisions the Presiding Officer might issue. However, placing reliance on the explicit authorization for such a designation as Presiding Officer in Section 554 (d) of the A.P.A., as well as on United States v Litton Indus., 462 F. 2d 14, 16-17 (9th Cir. 1972) and the comments of Professor Davis, 8/ and distinguishing Amos Treat v S.E.C., 9/ upon which Respondents had based their objection, the Presiding Officer respectfully suggested to the Commission that Respondents' objection to the designation of a Commissioner lacked merit. (Docket #8). By written order dated May 16, 1975 overruling Respondents' objection, the full Commission agreed. (Docket #11).

8/ 2 Administrative Law Treatise § 13.10, p. 237. See also Withrow v Larkin, 95 S. Ct. 1456 (1975); Docket #s 37,41.

9/ 306 F. 2d 260 (D.C. Cir., 1962).

On May 15, 1975, Respondents also filed a complaint for injunctive and declaratory relief in the United States District Court for the District of Delaware raising this same objection to the designation of a Commissioner as Presiding Officer, and others. 10/ In dismissing Respondents' Complaint, without prejudice, for want of jurisdiction and indicating that even had he jurisdiction, Respondents' motion for preliminary injunction would be denied, District Judge Schwartz found

> no matter in the Complaint which could be subject to judicial consideration as a matter of law outside the context of the ongoing administrative proceeding [nor] . . . final agency action at this juncture,

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10/ Other objections raised in Respondents' District Court Complaint were to the Rules of Practice which were to govern the adjudicatory proceedings before the Presiding Officer, the timetable that had been imposed, the attempt at retrospective application of the statutory provisions, the choice by the Commission of adjudicatory rather than rulemaking proceedings, the constitutionality of the underlying statutes, and the failure of the Commission to comply with the National Environmental Policy Act. These objections are discussed, infra.

> either within the meaning of 5 U.S.C. Section 704 or the common law definition thereof. 11/

(b) The Notice of Enforcement

In a motion filed May 16, 1975, Respondents also argued that the Notice of Enforcement must be amended to provide a

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11/ White Consolidated Industries, Inc. v Consumer Product Safety Commission, Civ. Action No. 75-135 (D. Del.), unreported decision of May 23, 1975, tr. at pp. 69-72 (citations omitted). Moreover, Judge Schwartz further found that

> as a matter of judicial restraint, [he] could not exercise jurisdiction in this case . . . because [Respondents] have administrative remedies which have not been exhausted . . . and no clear showing [has] been made that the prescribed administrative procedure is inadequate to prevent irreparable injury.

Finally, the Court concluded that

> this action is not ripe for judicial intervention. The issues tendered are not purely legal, there has been no final agency action, and the balance of hardships involved is found not to weigh in [Respondents] favor. In fact, at this juncture, it's literally impossible because the matter is so far from being ripe to weigh the cost of compliance against the cost of noncompliance . . . (T)he expenses of participation in allegedly unlawful proceedings do not state a claim of irreparable injury [and] . . . the risk of a bad decision or an adverse decision, is in and of itself not enough to constitute irreparable injury. The outcome of the decision is entirely speculative and at this point in the record is not supported by a showing that any harm whatsoever will accrue to [Respondents] until the administrative process has resulted in a final order. Even after such an order should be entered [Respondents] would have to demonstrate pre-enforcement harm to obtain injunctive relief.

Id.

more definite statement of the allegations of Enforcement Counsel [12] because, as presented, the Notice did not state Enforcement Counsel's actual allegations "with sufficient specificity to permit Respondents to determine (their) exact nature, to fully and reliably define the issues the allegations raise, and to prepare Respondents' position regarding those issues." (Docket #16). [13]

In an Order issued July 2, 1975 (Docket #61), the Presiding Officer denied Respondents' motion, holding that the Notice of Enforcement in this case had indeed specified "with reasonable definiteness . . . the type of acts or practices alleged to be in violation of the law," [14] and thus having been given a "reasonable opportunity to know the claims of

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[12] An adjudicative or adjudicatory proceeding is commenced by the issuance and service upon Respondent of a Notice of Enforcement in a form specified in Section 1025.31 of the Rules of Practice. Enforcement Counsel are counsel for the Commission Staff in any such adjudicative proceeding. Rules of Practice, Section 1025.4.

[13] Respondents also moved on May 16, 1975 that the three exhibits attached to the Notice of Enforcement as part of the Staff's prima facie case be stricken as inadmissable evidence not properly included in the record. Docket #17. Since the Rules of Practice (Section 1025.31(b)) explicitly required the attachment of such internal memoranda to the Notice, as an aid to Respondents in further illuminating the dimensions of the Staff's case, the Presiding Officer ruled that these documents would remain in the "Official Docket," though they were not to become "part of the record upon which the final decision is to be predicated" unless and until such evidence was offered by a party and met the tests for admissability established in Section 1025.63 of the Rules of Practice and other appropriate provisions of the law. Docket #61.

[14] Rules of Practice, Section 1025.31 (b) (2).

the opposing party and to meet them" 15/ Respondents had been afforded all that the A.P.A., the Constitution and fairness demanded. 16/

In this Order, the Presiding Officer emphasized the relatively insignificant role played by the Notice of Enforcement in educating Respondents about the nature of Enforcement Counsel's case. Embracing Davis' observation that "(t)he most important characteristic of pleadings in the administrative process is their unimportance," 17/ the Order stressed that

> (t)he key to pleading in the administrative process is nothing more than opportunity to prepare. Pleading is only one of many ways of providing opportunity to prepare. Deficiencies in a pleading may be cured by informal communication, by formal amendment, by a bill of particulars, by pre-hearing conferences, or by ample continuances at the hearing. And the question on review is not the adequacy of the original notice or pleading but is the fairness of the whole procedure. 18/

15/ Morgan v United States, 304 U.S. 1, 18 (1938).

16/ See Section 554(b) of the A.P.A.; L.G. Balfour v F.T.C., 442 F. 2d 1, 19 (7th Cir. 1971).

17/ Davis, 1 Administrative Law Treatise § 8.04, p. 523. See also 2 Moore, Federal Practice (2d ed.) 1607 (1948), as quoted in Davis id. ("pleadings . . . do little more than indicate generally the type of litigation that is involved. . . . A generalized summary of the case that affords fair notice is all that can be expected.").

18/ Davis, supra n. 17, at p. 525 (citations omitted). If it were otherwise -- if it were impermissable to sharpen the issues in a case through the type of informal discovery subsequent to the issuance of the Notice of Enforcement engaged in in this case, and instead the Notice itself became the sole gauge of the adequacy of pre-hearing disclosure -- then it seems inevitable that massive delays would be experienced before such a "comprehensive" Notice could be issued. Such delays would be intolerable in the face of the potentially serious human injuries at stake in proceedings of this nature.

(c) The National Environmental Policy Act

Respondents also urged that the Notice of Enforcement be rescinded and that all proceedings be terminated on the ground that the Commission had failed to comply with the National Environmental Policy Act (42 U.S.C. §§ 4321 et seq.) (NEPA). (Docket #s 14 and 33). They stressed that since "it cannot be realistically argued that the disposal of large numbers of major appliances would not significantly affect the quality of the human environment," the Commission, in accordance with NEPA, should have "prepared and considered the required environmental impact statement prior to the commencement of this case," and that its failure to do so required that the proceedings not go forward.

The Presiding Officer, in a lengthy Opinion and Order filed on July 14, 1975 (Docket #74), held otherwise. Acknowledging that the Commission, in issuing its Notice of Enforcement against Respondents, had neither formulated a "negative declaration" nor drafted, circulated and considered an environmental impact statement, and that NEPA itself contained no express exemptions from the impact statement requirements of Section 4332(2) of the Act, the Presiding Officer ruled that nevertheless an examination of NEPA's legislative

history, 19/ the cases decided under it, 20/ and the statutory framework for adjudicatory hearings established by Section 15 of the Consumer Product Safety Act 21/ provided persuasive evidence that Congress did not intend that the

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19/ See H.R. Rep. No. 91-765, 91st Cong., 1st Sess. (compliance with Section 4332 (2) (C) required unless existing law "expressly prohibits or makes full compliance with one of the directives impossible"); S. Rep. No. 91-296, 91st Cong., 1st Sess. ("project proposals for new legislation, regulations, policy statements, or expansion or revision of on-going programs," but not "adjudications," listed as the types of actions to which the impact analysis requirement might apply).

20/ See, e.g., Amoco Oil Co. v E.P.A. 501 F. 2d 722, 749-50 (D.C. Cir. 1974) (certain EPA action under Clean Air Act exempted from NEPA); Gulf Oil Co. v Simon, 373 F. Supp. 1102, 1105 (D.D.C. 1974) (exempting energy office from NEPA requirements for emergency oil allocation regulations since to force compliance therewith "would disarm the FEO of its ability and authority to take necessary action with the required degree of speed"). See also Cohen v Price Comm., 337 F. Supp. 1236 (S.D.N.Y. 1972). But see Calvert Cliffs Coor. Comm. v A.E.C., 449 F.2d 1109 (D.C. Cir. 1971).
Of particular significance is Gifford-Hill and Co. v F.T.C., 389 F. Supp. 167, appeal pending, No. 74-2024 (D.C. Cir., 1974), exempting from "the range of decisions to which NEPA was intended to apply" the FTC decision to proceed against Gifford-Hill, by administrative complaint seeking divestiture after an adjudicatory hearing, for its alleged violations of the antitrust laws.

21/ "The allegations of 'substantial risk of injury to the public,' which are to be expeditiously adjudicated in a Section 15(f) hearing, can not possibly be timely decided if prior even to the commencement of such a proceeding, the delicate, complex, and very time-consuming environmental impact statement requirements of NEPA must be followed . . . (A)pplication of the NEPA impact statement requirements to Section 15(f) adjudications is especially inappropriate in view of the "election" remedy given a Respondent [since] . . . it is the Respondent, and not the Commission, who is able to structure the environmental consequences of an Order, because it is only the Respondent who can elect at the conclusion of a hearing whether to repair, replace, or refund the purchase price of the hazardous products." Presiding Officer's Order, Docket #74.

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environmental impact statement requirements of NEPA apply to adjudicatory proceedings commenced by the Commission under Section 15 of the Act.

Accordingly, Respondents' motion to dismiss the proceedings on this ground was denied.

(d) The Rules of Practice

The Commission's Rules of Practice are in proposed and interim, rather than final, form. 22/ Because of this, Respondents argued that this proceeding must be deferred until after these rules were finalized. (Docket #5). Respondents' argument was rejected by the Presiding Officer, who held that the Commission, given its publication in the Federal Register of interim rules to govern this adjudicative proceeding and the fact that Respondents had actual timely notice thereof, had fully complied with its statutory mandate. That the Commission went beyond A.P.A. requirements for the promulgation of rules of practice, and formally invited public comment thereon, or that such rules might be amended at some unspecified time

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22/ See note 2, supra, at p. 2.

in the future did not, in the judgment of the Presiding Officer, alter this conclusion.23/

(e) The Timetable

Respondents vigorously and repeatedly argued 24/ that the pre-hearing schedule, as suggested, 25/ amended, 26/ and imposed 27/ by the Presiding Officer, was unworkable and unfair. The Presiding Officer disagreed, ruling that Respondents had ample time to prepare their case when measured from the most important date in the proceeding -- the date the Notice of Enforcement issued -- and had more than adequate

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23/ Docket #25. See A.P.A., Sections 552(a)(1)(C), 553(b); Fargo Packing Corp. v Hardin, 312 F. Supp. 942, 949 (S.W.D.N.D., 1970). But see American College of Neuropsychopharmachology v Weinberger, No. 75-1187 (D.D.C., July 21, 1975).

Respondents' similar complaints about the failure of the Commission, contrary to the requirements of the A.P.A., to publish a description of its central and field organization and the "general course and method by which its functions are channeled and determined," were also rejected by the Presiding Officer. Docket #25.

24/ Docket #s 5, 24, 37, and 78.

25/ Docket #6.

26/ Docket #23.

27/ Docket #40.

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notice of the intention of the Presiding Officer to reflect in these proceedings the sense of urgency inherent in the statutory scheme and Rules of Practice issued by the Commission. 28/

In fact, due in large measure to the professionalism and dedication of counsel and witnesses for both parties, it is the judgment of the Presiding Officer that despite the compact schedule adopted, 29/ all legal and factual issues in this proceeding have been fully developed by the parties, and in a

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28/ Docket #40. The Rules of Practice, though they require "due" regard for the convenience of the parties, place a heavy emphasis on expedition. In their opening paragraph (Section 1025.1), they state:

> The Commission believes that administrative adjudicative proceedings should be an expeditious manner of settling disputes. Delay does not benefit the public or any party. Therefore, in the conduct of such proceedings, the Presiding Officer and all parties and their representatives shall make every effort at each stage of a proceeding to avoid unnecessary delay.

29/ The pre-hearing schedule issued by the Presiding Officer on May 27, 1975 (Docket #40) required Enforcement Counsel to file their responses to Respondents' May 16 motions by June 4. By June 11, Enforcement Counsel were to file all of their direct testimony, in question/answer format, and were cautioned that "absent extraordinary cause shown, Enforcement Counsel's written direct testimony, unless filed by June 11, will not be admitted." Respondents were instructed to similarly file their direct testimony no later than June 30, and similarly cautioned. Finally, both Enforcement Counsel and Respondents were to file all written rebuttal testimony, also in question/answer format, no later than July 11 with this same warning that absent extraordinary cause shown no further testimony by either party would be admitted at the hearing commencing July 14, which hearing was, in the absence of extraordinary circumstances, to be limited to oral cross-examination.

The use of written direct and rebuttal testimony, submitted in advance of the hearing as specified above, was quite successful as a device for permitting both expert and lay testimony to be developed fully, rapidly, and in a manner best calculated to enhance the quality of the live cross-examination at the hearing and the free flow of information between the parties prior to the hearing.

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time frame which met the overriding public interest of securing a most prompt initial decision as to the presence of a substantial product hazard. 30/

(f) The Propriety of Adjudication

Respondents, asserting that defrost timers or motor switches are "the crucial components involved in the Notice of Enforcement," and that the timers in Respondents' refrigerators are found in at least 90% of the total of home refrigerators sold in the United States in 1975, moved that the Notice of Enforcement be rescinded on the ground that this should be a rulemaking rather than an adjudicatory proceeding. (Docket #s 12, 31). As Respondents phrased it, "(t)he question which CPSC has about defrost timers should not properly be directed only at Kelvinator, and the Commission's action in doing so is unlawfully discriminatory." (Docket #12).

Enforcement Counsel, though declining to challenge the accuracy of Respondents' factual assertions, urged that

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30/ The Rules of Practice (Section 1025.66) give the parties a right to submit proposed findings and conclusions generally within 30 days after the close of reception of evidence, with replies thereto to be filed within another fifteen days. That the Presiding Officer permitted this full period of time for such submissions, rather than her earlier stated intention to foreshorten this period to fifteen and seven days, respectively, was due to her preliminary assessment of the likelihood of Enforcement Counsel prevailing on the merits. Had this assessment instead favored the position presented by Enforcement Counsel, neither the parties nor the Presiding Officer would have had the luxury of utilizing as leisurely a pace as employed herein for presenting and deciding the important safety questions that had been raised.

Respondents' motion be denied anyway because the real issue in this case was said to be not the safety of the design of a component part of refrigerators (their defrost timers), but rather the safety of the refrigerators as a whole. And, with respect to refrigerators as a whole, Enforcement Counsel state:

> There is no information presently available to Enforcement Counsel that would lead us to believe that other manufacturers of refrigerators attach the defrost motor switch neon gas tube and insulator, and refrigerators in the same configuration as Respondents did in the models in question . . . To date, the Commission has received no information from any of [its] sources which would lead the staff to believe that all refrigerators as a class, or any sub-class of refrigerators, could present the same hazard to the public that the staff alleges Respondents' refrigerators present. (Docket #43, pp. 2, 5.)

Believing that development of a more complete factual record might be helpful in resolving this motion, a decision on it was deferred until the hearing was completed For the reasons discussed below, the Presiding Officer now denies Respondents' aforementioned motion to rescind the Notice of Enforcement. 31/

Even if there was evidentiary support for a choice in this instance between rulemaking and adjudication, it has been clearly and consistently held that such a choice "is one that

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31/ This ruling on this motion, as well as all other rulings on legal issues discussed in this INITIAL DECISION, are, for convenience, reflected in the attached ORDER.

lies primarily in the informed discretion of the administrative agency." S.E.C. v Chenery Corp., 332 U.S. 194, 203 (1947). As the Court of Appeals stated, in a slightly different context, in Philadelphia Television Broadcasting v. F.C.C., 359 F.2d 282, 284 (D.C. Cir., 1969):

> In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective.

See also American Machinery Corp. v. N.L.R.B., 424 F.2d 1321, 1330 (5th Cir., 1970). 32/

In fact, though, as the staff response to Respondents' motion quoted above accurately notes, from its inception this proceeding has been concerned with the design of

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32/ And, having lawfully chosen to proceed by adjudication, "in the absence of a patent abuse of discretion" it is permissable for the staff to proceed against Respondents, first, before turning to others -- if any -- against whom the law may also be enforced. Regina Corp. v F.T.C., 322 F.2d 765, 769 (3rd Cir., 1963).

Moreover, nothing in the split opinions in N.L.R.B. v Wyman - Gordon, 394 U.S. 759 (1969), relied upon by Respondents, would have prohibited the application of a "rule", even unlawfully developed in an adjudicatory proceeding, to the Respondent in that proceeding. Nor are the facts in this case even remotely analogous to those involved in the invidious class discrimination of Yick Wo v Hopkins, 118 U.S. 356 (1886), also cited by Respondents.

refrigerators and not just one of their parts,[33] and the Presiding Officer finds, on the basis of the evidence in the record, that (1) there does not exist any other refrigerator of design closely similar to those at issue herein. [34]

For all these reasons then, Respondents' motion, arguing for the necessity for a rulemaking rather than an adjudicatory proceeding, must be denied.

(g) The Proper Respondents

The Notice of Enforcement (Docket #1) names as Respondents in this proceeding the following individuals and entities:

(A) White Consolidated Industries, Inc., Cleveland, Ohio;
(B) Kelvinator, Inc., Grand Rapids, Michigan;
(C) G.R. Manufacturing Co., Grand Rapids, Michigan;
(D) Edward S. Reddig;
(E) Thomas I. Dolan; and
(F) Roy H. Holdt.

33/ The Notice of Enforcement alleges that "approximately 336,000 refrigerators . . . present a substantial product hazard . . . because the staff believes the following design defects could cause . . . injury, (emphasis added)."

34/ Findings of Fact are numbered sequentially throughout this INITIAL DECISION. Support in the record for each Finding is discussed in the text and footnotes accompanying that Finding, and the rulings of the Presiding Officer on related findings proposed by Enforcement Counsel and Respondents are referenced in the Appendix. With respect to Finding (1), Respondent Dolan, an official of Respondent Kelvinator, Inc., testified that he did not know of any models of refrigerator duplicating exactly the design of the Respondents' refrigerators at issue herein (Tr., pp. 505-06), and Enforcement Counsel witness Honnoll, also with years of experience in the home refrigeration industry, added that he had never known a refrigerator with components even similarly arranged. Tr., pp. 110-11.

Respondents have asserted that the inclusion of the names of White Consolidated Industries, Inc. (hereinafter "WCI") and the three individuals Reddig, Dolan, and Holdt[35/] constituted unjustified harassment and abuse of process." (Docket #34). They urged that these names be stricken and that any Order which might issue name as Respondents only Selvigator, Inc. and G.R. Manufacturing Co.

Agreeing with Enforcement Counsel, however, that the resolution of the issues raised by Respondents would be aided substantially by a fully developed record illuminating the precise relationships among and between the parties named in the Notice of Enforcement, the Presiding Officer deferred a ruling on Respondents' motion until after the hearing had concluded. (Docket #60).

35/ Respondents Reddig and Dolan were named in this Notice of Enforcement both as corporate "officers" and "individually."

On the basis of the Findings of Fact 36/ and reasons discussed below, the Presiding Officer, with two exceptions as noted, denies Respondents' Motion to strike the names of certain Respondents in the Notice of Enforcement.

(2) Respondent Kelvinator's business is the design, manufacture and sale of household appliances including refrigerators, freezers, ranges and refrigerant compressors. 37/ (3) Kelvinator is the corporation that designed, manufactured, and distributed the refrigerators which are the subject of this proceeding. 38/ (4) Respondent Kelvinator does business under the name of Respondent G.R. Manufacturing Co., and when Kelvinator

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36/ Much of the factual record relating to the corporate status of the named Respondents was developed during an *in camera* hearing held under procedures established by the Presiding Officer in an Order dated July 9, 1975. Docket #68a. In accordance with the procedures outlined in that Order, the Presiding Officer has issued this date, for reasons discussed *infra*, a separate order granting in part Respondents' Motion requesting indefinite *in camera* treatment for selected, rather limited, portions of the transcript prepared during this *in camera* hearing and for several of the exhibits introduced therein. All other portions of the record in this case will be included in the public "Official Docket," and the Findings of Fact discussed herein relate solely to such publicly available information.

37/ Tr., p. 199; Respondents' Exhibit (hereinafter "R. Ex.") A, pp. 2,3.

38/ Dauscher affidavit (Docket #35); R. Ex. A, p. 6.

manufactured refrigerators they were produced by G.R., a division of Kelvinator and its manufacturing arm. 39/

(5) Kelvinator is, in effect, a "pseudonym" for Respondent G.R. Manufacturing. 40/

Given these facts, Respondents acknowledge, as they must, that Kelvinator and G.R. Manufacturing have been properly named as the "manufacturers" of the products at issue. 41/ Respondents nevertheless object to the naming as additional Respondents, among others, Kelvinator's corporate officers Reddig and Dolan.

Respondent Edward S. Reddig is named in the Notice of Enforcement "individually and as an officer of White Consolidated Industries, Inc., and Kelvinator, Inc." (Docket #1).

(6) Edward S. Reddig is not currently an officer of Respondent Kelvinator. 42/ Accordingly, that portion of the Notice of Enforcement naming Mr. Reddig in his capacity as an officer of Kelvinator, Inc., must be stricken.

39/ Tr., pp. 213-24.

40/ Tr., p. 214.

41/ Though originally objecting to the naming of G.R. Manufacturing Co. as a Respondent (Docket #18), Respondents subsequently withdrew that objection. (Docket #34). But see Docket #78, p. D-21.

42/ Enforcement Counsel's Exhibit (hereinafter "E.C. Ex.") 12.

(7) Respondent Thomas I. Dolan, however, is an officer of Kelvinator, having been its President since 1969. As President, Mr. Dolan is responsible for all day to day operating decisions, such as production manufacturing control and refrigerator design, as well as for some policy decisions.43/

Respondents argue that Mr. Dolan is not properly named as a Respondent in his corporate capacity because any orders directed to corporate Respondent Kelvinator "are automatically binding on the officials 'responsible for the conduct of its affairs' . . . and these individuals may be punished by contempt if they prevent compliance . . . ." Doyle v. F.T.C., 356 F.2d 381, 384 (5th Cir., 1966), quoting Wilson v United States, 221 U.S. 361 (1911). Since Respondents therefore conclude that naming such officials in their corporate capacity is "totally useless," they contend that "the only purpose it can serve is one of harassment, which is not a proper basis for an administrative agency to proceed upon." (Docket #34).

Further, Kelvinator corporate officer Dolan has also been named "individually" as a Respondent. This, too, was

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43/ Tr., pp. 204, 231-32.

improper, urge Respondents, since there is

> no reason to name a corporate officer in his individual capacity unless (1) the officer has himself as an individual engaged in the conduct which is the subject of the proceeding or (2) the corporation involved is a sham or an "alter ego" of the officer and there would therefore be a substantial likelihood of evasion of a Commission order if the individual were not named. See Doyle v Federal Trade Commission, supra. (Docket #34).

Although Respondents, in forumulating their arguments, have isolated some of the factors that have been considered under a variety of statutory schemes in determining the propriety of naming persons in their corporate and individual capacities, their reliance exclusively on such factors to set similar standards fo orders issued under Section 15 of the Consumer Product Safety Act is misplaced for several reasons.

First, orders issued under Section 15 are unlike the cease and desist orders involved in Doyle v F.T.C., supra, and similar cases cited by Respondents. With cease and desist orders or prospective injunctions, "future corporate activities are the sole concern . . . ." Doyle v. F.T.C., supra, 356 F.2d at 383. Section 15 orders, however, do not look soley to the future. Instead, they focus on corporate activities, the ill effects of which they seek to remedy by requiring action aimed with precision at the very persons

who suffered those past effects. Moreover, in contrast to the cease and desist order entered under the Clayton Act in Doyle, no similar promise of future forebearance from unlawful conduct is expressly authorized by the statutory language of Section 15 of the Consumer Product Safety Act as a remedy for the violations it encompasses.44/ Rather, the Section 15 order is more closely akin to one intended to "exact compensatory damages for past acts." But it is this type of order, as opposed to a cease and desist order designed to prevent "illegal practices in the future," which the Doyle Court believed does legitimately name corporate officials. Doyle v F.T.C., supra, 356 F.2d at 382.

Second, and as a result of this difference in the nature of the relief secured by a Section 15 order as distinguished from a cease and desist order, there need be little fear that

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44/ The Order proposed by the Staff in this case and attached to the Notice of Enforcement does include a requirement that the named Respondents "stop manufacturing . . . [these] refrigerator models . . . or any other refrigerator of similar design or construction, containing any of the defects found to create a substantial product hazard." Further, the proposed order also requires of individual Respondents that they "notify the Commission of the discontinuance of [their] present business or employment and of [their] affiliation with a new business or employment." Even assuming, without deciding, that the Commission has the inherent power to augment its statutory remedies under Section 15 of the Act with the additional requirements enunciated in these provisions of the proposed order, their inclusion does not alter the principal purposes of such an order which remain the institution of notice and of product repair, replacement or refund.

the Section 15 order could constitute the "brand for life," or the "albatross" around a Respondent's neck, that so obviously troubled the Doyle Court as it declined to extend that order's reach to Mr. Doyle in his individual capacity. 356 F.2d at 385.

Finally, it has been recognized that there are situations, even in the context of prospective cease and desist orders or injunctions, where individuals as well or corporations are appropriately named. Thus, in Doyle itself, the court merely indicated that under the circumstances it presented "there seems to be little reason for including corporate officers as individuals in the orders unless there is a possibility of evasion." 356 F.2d at 384 (emphasis added). Similarly, in Hartford-Empire Co. v United States, 323 U.S. 386, 434 (1945) (emphasis added), also relied upon by Respondents, the Court noted: "There is no apparent necessity for including them individually in each paragraph of the decree which is applicable to the corporate defendants whose agreements and cooperation constitute the gravamen of the complaint."

Here, however, that "necessity" is "apparent." As has been previously emphasized, 45/ there is a sense of urgency that

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45/ See note 28, infra, at p. 15, and accompanying text.

pervades the substantial product hazard provisions of Section 15 which argues persuasively for granting to the Staff and, ultimately the Commission, the discretion to identify and name in these proceedings specific individuals whom it can hold responsible for formulating and directing an immediate and effective remedial action program.46/ As Enforcement Counsel aptly note (Docket #77, p.83):

> When a corporation is slow to act, there is not time to enter into the corporate morass in an attempt to find the officer responsible for carrying out the Commission's order. Moreover, the Commission is more likely to ensure immediate and strict compliance with its Order simply by virtue of fact that the Order is against named individuals who, if they fail to comply with the Commission's Order, will be summarily liable for civil and criminal penalties under Sections 20 and 21 of the Consumer Product Safety Act.

In addition, in Benrus Watch Co., Inc. v. F.T.C., 352 F.2d 313 (8th Cir., 1965) and Standard Distributors, Inc. v. F.T.C., 211 F.2d 7 (2d Cir., 1954), it was held that even F.T.C. cease and desist orders, prospective though they be, may nevertheless properly name corporate officers as individuals, notwithstanding the absence of a sham corporation, the lack of a threat of

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46/ The Order proposed by Enforcement Counsel and attached to the Notice of Enforcement would require Respondents to submit their remedial plan to the Commission within "5 days" of the issuance of the Order, with the additional requirement that a sample of each corrected model be made "immediately" available to the Commission for its evaluation "before" such units are placed in the hands of consumers. Docket #1.

possible evasion of an order extending only to the corporation, or the departure of those named officers from the corporation subsequent to the completion of the illegal acts, as long as such individuals as are named were, as the Doyle Court phrased it, "officers in top control of the corporation; formulating, directing, and controlling corporate policies and practices." 356 F.2d at 385.

In short, because orders entered under Section 15, with their focus on past conduct, are so unlike prospective cease and desist orders and injunctions and do not stigmatize the individuals they name, and because, in any event, even in such prospective orders, officers in "top control" of a named corporation may still properly be named, it is clear that the cases relied upon by Respondents do not fully establish the controlling principles for deciding when persons may lawfully be named as officers and individuals in a proceeding under Section 15 of the Consumer Product Safety Act. Further guidance is necessary. That guidance may be found in the decisions of the Supreme Court in United States v Park, 95 S. Ct. 1903 (1975) and United States v Dotterweich, 320 U.S. 277 (1943).

In United States v Dotterweich, both the company and Dotterweich, its President and general manager, had been charged with criminal violations of the Federal Food, Drug and Cosmetic Act (21 U.S.C. §§301-392). Dotterweich had been convicted. Section 301(a) of that Act "prohibited the introduction . . . into interstate commerce of any . . . drug . . . that is adulterated or misbranded." Section 303(a) of the Act established a misdemeanor penalty for "any person" violating this provision.

On appeal, the Supreme Court upheld Dotterweich's conviction, rejecting the contrary view of the lower court that "only the corporation was the 'person' subject to prosecution unless, perchance, [the company] was a counterfeit corporation serving as a screen for Dotterweich." 47/

In support of its judgment, the Supreme Court observed that the "only way in which a corporation can act is through the individuals who act on its behalf," 48/ and emphasized that the Food, Drug and Cosmetic Act "is concerned not with the proprietory relation to a misbranded or an adulterated drug but with its distribution. In the case of a corporation such

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47/ United States v Dotterweich, 320 U.S. at 279. The Court of Appeals had held that where the drug proprietor was a corporation, an individual connected therewith might be held personally only if he was operating the corporation "as his 'alter ego.'" United States v Buffalo Pharmacal Co., 131 F.2d 500, 503 (2d Cir., 1942).

48/ 320 U.S. at 281.

distribution must be accomplished, and may be furthered by persons standing in various relations to the incorporeal proprietor." 49/ The key inquiry, therefore, was whether "an accused shares responsibility in the business process resulting in unlawful distribution," and an offense was committed "by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs." 50/

The purposes of the Food, Drug, and Cosmetic Act, emphasized the Court, "touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection . . . . Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless." The Court stressed that "(r)egard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words." 51/

49/ Id., at 283.

50/ Id., at 284.

51/ Id., at 280, 285.

These same points were given renewed force and vitality in United States v Park, supra. In Park, as in Dotterweich both the corporation and its President and chief executive officer (Park) had been charged with criminal violations of the Federal Food, Drug and Cosmetic Act. Park, like Dotterweich, had been convicted. Section 301 (k) of the Act "prohibited . . . the doing of any . . . act with respect to a food . . . if such act is done while such article is held for sale . . . after shipment in interstate commerce and results in such article being adulterated . . . ." 52/ Again, the same section as in Dotterweich, Section 303(a), established the penalty for "any person" who violates this provision.

On appeal, the Supreme Court, as it had in Dotterweich, upheld the conviction. It stated:

> Dotterweich and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission--and this is by no means necessarily confined to a single corporate agent or employee--the act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them. 53/

52/ Section 402 of the Act, 21 U.S.C. §342, provided in part that "A food shall be deemed to be adulterated . . . if it has been prepared, packed, or held under insanitary conditions . . . whereby it may have been rendered injurious to health."

53/ 95 S. Ct. at 1911.

It was not, stressed the Court in Park, knowledge, intent, consciousness or wrongdoing, or personal participation that was determinative of the liability of Park as a managerial officer, but rather

> that the fact the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so. 54/

The parallels between the situation confronting the Court in Park and Dotterweich, and that before the Presiding Officer in this proceeding under Section 15 of the Consumer Product Safety Act, are striking. In Dotterweich, the statutory concern was with the distribution of offending products. This same concern is expressed in the finding that must accompany an order issued pursuant to Section 15(d) that the "product distributed in commerce presents a substantial product hazard." In neither situation need there by any consciousness of wrongdoing to invoke the sanctions of the Acts. In both situations, corporate distribution must be accomplished and may be furthered by persons standing in various relations to the corporation.

54/ 95 S. Ct. at 1912.

The product-centered inquiry in Park looked at articles that "may be injurious to health;" the inquiry here focuses on products creating a substantial "risk of death, personal injury, or serious or frequent illness." 55/ Here, as in Park, the purposes of the Act "touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection." Here, as in Park, the act imposes "a positive duty to seek out and remedy violations when they occur," a demanding duty "the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them."

To be sure, there are also differences between the situation found in Park and that in the instant case. Unlike Park, which involved a criminal prosecution in a district court, Section 15 proceedings are civil in nature and initiated in an administrative agency tribunal. But, the proceedings in both situations focus on past conduct. And that the "Congress has seen fit to enforce the accountability of responsible corporate agents dealing with products which may affect the health of consumers by penal sanctions cast in rigorous terms " in one case, and instead has chosen a

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55/ Section 3(a)3 of the Consumer Product Safety Act, 15 U.S.C. 2052(a)(3).

different form of civil administrative sanctions in another, does not alter the common obligation of the Presiding Officer and "of the Courts to give [such sanctions] full effect so long as they do not violate the Constitution." 56/

Given these striking similarities, and relatively unimportant differences, the Presiding Officer has concluded that the principles of managerial corporate responsibility enunciated in Park are equally applicable to proceedings commenced under Section 15 of the Consumer Product Safety Act. It is the holding of the Presiding Officer, therefore, that where, as here, a corporation is properly named as the "manufacturer, distributor, or retailer" of the product alleged to present the substantial product hazard, the [corporate]officials associated with that properly named corporation may also be named in[their]corporate capacity in the Notice of Enforcement commencing the proceedings under Section 15 of the Act if they are in "top control" of that corporation "formulating, directing and controlling [corporate] policies and practices," 57/ or, alternatively, "by reason of [their] position in the corporation, [they have the]

56/ United States v Park, supra, 95 S. Ct. at 1912. Nor, given the civil nature of the Section 15 proceeding, will the "stigma of a criminal conviction" that attached to Dotterweich (Murphy, J., dissenting, 320 U.S. at 286) similarly follow individuals named as respondents in their corporate capacity, upon the entry of an administrative order.

57/ Benrus Watch Co., Inc. v F.T.C., 352 F.2d 313, 324 (8th Cir., 1965), cert. denied 384 U.S. 939 (1966).

responsibility and authority either to prevent in the first instance, or promptly to correct," 58/ the alleged substantial product hazard at issue.

In light of this holding and his duties at Kelvinator, 59/ Respondents' Motion to strike Mr. Dolan from the list of Respondents named in their corporate capacity must be denied.

Also denied is Respondents' Motion to strike Mr. Dolan from the list of Respondents named "individually." This ruling follows not from the conclusion that Respondent Kelvinator is but a sham or "alter ego" of Respondent Dolan, though if it were, as Respondents correctly note, his inclusion in his individual capacity would have been proper. Rather, it follows from the necessity of bringing Mr. Dolan "individually" under those terms of the Order which would personally bind him in the future should he leave his present corporate employment. 60/

Similar considerations govern the disposition of Respondents Motion to strike WCI and its corporate officers Reddig and Holdt from the list of Respondents in this proceeding.

58/ United States v Park, Supra, 95 S. Ct. at 1912 (1975).

59/ See note 43, infra, at p. 23, and accompanying text.

60/ See note 44, infra, at p. 25.

(8) Respondent White Consolidated Industries, Inc. (WCI) is engaged, principally through wholly-owned subsidiaries, in the manufacture and distribution of a broad range of products and services. 61/ (9) WCI acquired Kelvinator in 1968 and subsequent thereto it has been wholly-owned by WCI. 62/ (10) WCI does not permit its subsidiaries, such as Respondent Kelvinator, to transfer assets (other than excess assets) among themselves. When excess assets are transferred, no cash changes hands; rather, a book transfer is arranged crediting the fixed asset account at Kelvinator, debiting the cash account at the subsidiary to which the asset was sent, and, at the end of the year, balancing all books at the WCI level. 63/ (11) Normally, for day to day capital needs, Kelvinator does not raise its own capital, but WCI, instead, acts as its banker, going to the money markets on its behalf. 64/ (12) Each year, Kelvinator submits its capital budget to WCI for approval by the senior corporate management group at WCI. Kelvinator's annual capital budget is not automatically approved by WCI.

61/ E.C. Ex. 11, p.26.

62/ Tr., p. 198; Dauscher affidavit, Docket #35.

63/ Tr., pp. 221-22.

64/ Tr., pp. 210-11.

Like any banker, WCI will approve or disapprove or modify the Kelvinator budget based on what it conceives necessary to the protection of its investment and loan interest.65/

(13) Kelvinator does not submit an operating budget to WCI, but Kelvinator's financial officers report Kelvinator's cash position on a daily basis to WCI, and submit monthly operating and profit-and-loss statements to WCI. Kelvinator does not have the freedom to withdraw funds from its own bank deposit accounts. Instead, to withdraw funds from its deposit accounts, it must get express approval for other than routine payables from WCI for a cash transfer. This arrangement serves WCI's need to control Kelvinator's cash assets and thus protect its security interest. 66/

(14) WCI charges each of its subsidiaries, including Respondent Kelvinator, on a formula basis for corporate general and administrative expenses in rendering services to them. Among the charges billed to subsidiaries by WCI are those for insurance, financial, executive and legal services. When Kelvinator realized that there might be a proceeding in this matter, it came to WCI's legal department

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65/Tr., pp. 210-11.

66/Tr., pp. 211, 219-20.

to ask for direction on what to do, and turned to another WCI subsidiary for product testing in connection therewith. 67/

(15) WCI consolidates the profits of all of its subsidiaries for reporting and tax purposes and it is WCI that declares dividends for WCI stockholders; Kelvinator does not declare its own dividends. Kelvinator's profits all eventually accrue to the benefit of WCI's stockholders, and WCI has a strong interest in Kelvinator's trade name as well as the public's acceptance of products sold under the Kelvinator label. 68/

WCI and Kelvinator are also linked through their officers and directors. (16) Respondent Roy H. Holdt is President and Chief Operating Officer of WCI, a member of WCI's Board of Directors, Executive Vice-President of Kelvinator and a member of Kelvinator's Board of Directors. 69/ (17) Respondent Holdt is one of three members of Kelvinator's Board of Directors; the other two members are Messrs. Ward Smith and Karl Ware. Respondent Holdt, and Messrs. Smith and Ware, in addition to comprising Kelvinator's Board of Directors, are each also directors and officers of WCI. 70/

67/ Tr., pp. 222-24, 216-17, 218; E.C. Ex. 11, p. 26.

68/ Tr., pp. 213, 227.

69/ Tr., p. 203.

70/ Tr., pp. 196, 197; E.C. Ex. 12.

(18) WCI's Board of Directors is the ultimate determiner of WCI corporate policy and as a matter of practice, makes all major policy decisions relating to the total operation, like whether or not to acquire Kelvinator as a WCI subsidiary. In 1974, when Kelvinator discontinued its refrigerator manufacturing operation in favor of its relocation elsewhere within the WCI organization, that decision was orginated by Kelvinator's operating officers (among them Respondents Dolan and Holdt, and Messrs. Smith and Ware), all of whom are also WCI officers and three of whom (Holdt, Smith and Ware) are WCI board directors. 71/ (19) Furthermore, Respondent Dolan, Kelvinator's President responsible for all of Kelvinator's day to day operating decisions including refrigerator production manufacturing control and design, 72/ is also an officer of WCI serving as a Senior-Group Vice-President. 73/

(20) WCI considers its greatest strength to be the ability to transform losing companies into efficient moneymakers. That strength was exercised by WCI officers and employees to transform Kelvinator from a money loser at the time of its acquisition by WCI, into a money maker at the present time.

71/ Tr., pp. 199, 200; E.C. Ex. 11, 12.

72/ See note 43, supra, at p. 23, and accompanying text.

73/ Tr., pp. 203-04.

Those WCI employees and officers accomplishing that "turn around" task for Kelvinator are still available to Kelvinator "on a quasi-permanent basis." 74/

(21) Finally, in the event the refrigerators involved in this proceeding were found to present a substantial product hazard, it would be necessary for Kelvinator to submit an interim budget to WCI outlining the comparative cost of invoking each of the alternatives of repair, replacement, or refund, after which a final decision as to the alternative to choose would be made by WCI. 75/

While it is clear from these findings of fact that Respondent Kelvinator is not a "mere tool" of Respondent WCI, and that the corporate identity of the subsidiary is not a "mere fiction," 76/ they are nevertheless adequate to support the conclusion that WCI and Kelvinator "were transacting an integrated business through a maze of interrelated

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74/ Tr., pp. 227-28; E.C. Ex. 11, p. 3.)

75 Tr., pp. 229-31.

76/ See generally National Lead Co. v. F.T.C., 227 F. 2d 825, 829 (7th Cir., 1955) rev'd on other grounds, 352 U.S. 419 (1957). Had either of these more traditional criteria been met, of course, the authority to name both parent and subsidiary would be unquestionable. Id.

companies." 77/ It was, therefore, permissable for the Staff, in its discretion, to fashion a remedy naming both as corporate Respondents in this proceeding and thereby avoiding any possibility of evasion of a Commission order.

Moreover, even if Respondents WCI and Kelvinator had not been so closely linked as to warrant this finding concerning their intimate interrelationship, the thrust of Park and Dotterweich, supra, is that there may be circumstances where even two corporations -- and not just a single corporation and its officers -- may both properly be named as Respondents in a Section 15 proceeding despite the fact that they are clearly separate legal entities. After all, in Dotterweich liability was said to attach to anyone who "shares responsibility in the business process resulting in unlawful distribution" and extend to "all who do have such a responsible share in the furtherance of the transaction which the statute outlaws." 78/ Every reason discussed favoring the extension of Park and Dotterweich to authorize

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77/ Delaware Watch Co. v F.T.C., 332 F.2d 745, 746 (2d Cir., 1964). There, both corporations had their offices and principal places of business located at the same address, and shared common officers with the President and majority stockholder of the first corporation in turn owning all of the stock of the second. Id.

78/ United States v Dotterweich, supra, 320 U.S. at 284 (emphasis added).

the naming of both a corporation and its officers as corporate Respondents in a Section 15 case applies with equal force where, as here, the parent Respondent WCI had, by virtue of its relationship with subsidiary Respondent Kelvinator, the "responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of." United States v Park, supra, 95. S. Ct. at 1912.

For both of these reasons, then, Respondents' motion to strike WCI from the list of corporations named as Respondents in this proceeding must be denied.

And, having concluded that Respondent WCI was properly named, it follows that Respondent Edward S. Reddig, WCI's Chief Executive Officer -- just like his counterpart Respondent Dolan at Kelvinator -- 79/ has also been properly named in both his corporate and individual capacities. 80/

Lastly, the status of Respondent Roy H. Holdt, named soley in his corporate capacity as an officer of WCI, must be resolved. Mr. Holdt is President and Chief Operating Officer of WCI, a member of WCI's Board of Directors,

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79/ See notes 59, 60 , supra, at p.35, and accompanying text; Tr., p.204

80/ (22) Respondent Reddig is Chairman of the Board and Chief Executive Officer of WCI, serving as its senior executive responsible for its day to day management. Tr., p. 203; E.C. Ex. 11, p. 28; R. Ex. A, p. 7.

Executive Vice-President of Kelvinator, and a member of Kelvinator's Board of Directors. 81/ (23) Despite his position as an officer of Kelvinator, Mr. Holdt has no day to day functional responsibilities for Kelvinator, serving instead merely as a statutory officer signing documents like patent applications and tax returns on behalf of Kelvinator. 82/ Mr. Holdt's responsibilities and authority at WCI are unknown beyond the title of the positions he occupies.

Under these circumstances, it is impossible to conclude that Respondent Holdt meets the tests established earlier, in light of Park and Dotterweich for including as Respondents in their corporate capacity officers of respondent corporations such as WCI which have been properly named. 83/ Therefore, Respondents' Motion to strike Roy H. Holdt from the list of Respondents named in the Notice must be granted.

In sum, and for the reasons discussed above, the Presiding Officer has concluded that the corporate Respondents WCI and Kelvinator, and Respondents Reddig and Dolan have been properly named in each of the individual and corporate capacities listed for them with the exception of Respondent Reddig who was improperly named as an officer of Kelvinator. Respondent Holdt, however, was improperly listed, and his name must be deleted.

81/ See note 69 , supra, at p.38 , and accompanying text.

82/ Tr., p. 232-33.

83/ Had the jury in Park found Park guilty "solely on the basis of [his] position in the corporation," its error would have been patent. United States v. Park, supra, 95 S. Ct. at 1912.

(h) The In Camera Material

Section 1025.65 of the Rules of Practice permit in camera proceedings "only in . . . unusual and exceptional circumstances when good cause is found on the record . . . ." Expecting that parts of the testimony of Enforcement Counsel witness and corporate officer Ward Smith would involve "highly confidential commercial and financial information relating to the status of Kelvinator," but unable to predict in advance which portions of Mr. Smith's testimony might appropriately require protection, respondents requested that Mr. Smith's testimony be heard in camera. (Docket #68).

To accommodate the strong Commission policy favoring public accessibility to all evidence in this matter absent "unusual and exceptional circumstances," and the obvious merit of Respondents' request in light of the nature of witness Smith's expected testimony, the Presiding Officer received his testimony under the following conditions:

(A) Mr. Smith's testimony and associated documentary evidence related to Respondents' corporate structure and responsibilities were temporarily received in camera in their entirety in accordance with the provisions of Section 1025.65 of the Rules of Practice;

(B) Within 10 days of the filing by the Reporter under seal of the transcript of Mr. Smith's testimony,

Respondents were required to file under seal, and serve, a motion isolating the particular portions of the transcript and documentary evidence for which confidentiality was claimed, supporting their claims with a discussion of the "unusual and exceptional circumstances" involved and with citation to appropriate legal authority, and requesting the entry of a final in camera order to protect such material; and

(C) After considering Respondents' motion and any response thereto by Enforcement Counsel, the Presiding Order was to issue a final in camera order, if appropriate, removing from the protection of such an order all transcript or other documentary evidence and motions for which confidentiality had not been claimed by Respondents or for which Respondents' claims could not be sustained. (Docket #68a).

The transcript of Mr. Smith's in camera testimony totalled 48 pages (Tr. pp. 191-239) and embraced five Enforcement Counsel Exhibits (numbers 11-15). 84/ Respondents, in accordance with these procedures, moved the Presiding Officer for a final in camera order only for Enforcement Counsel Exhibits 13, 14, and 15, and for certain questions and answers found on pages 206, 207, 226, 227, 238, and 239 of the transcript. Enforcement Counsel opposed this request in its entirety, which opposition drew a Supplemental submission from Respondents.

84/ Thus, even this temporary in camera protection extended only to very minor portion of the record. See note 7 , supra, at p. 4 , and accompanying text.

Each of these filings are presently being held under seal in camera. Since neither party has requested that a final in camera order be entered to protect either their respective motion, opposition or supplement, or the pages of transcript or Enforcement Counsel Exhibits not listed above, the Presiding Officer, in a separate order issued this date, has provided for the prompt entry of these materials into the publicly available Official Docket.

The documents and testimony for which Respondents do claim confidentiality may be described in general terms as follows:

(A) A listing of some individuals or groups owning voting shares of WCI, the number of shares they own, and certain security position listings (Tr., pp. 206-07; E.C. Ex. 13, 15 and E.C. Ex. 14, in part);

(B) The percentage of WCI's total income received from the sale of Kelvinator refrigerators (Tr., pp. 226-27, 238-39); 85/ and

(C) Kelvinator, Inc.'s comparative balance sheets for January 1, and December 31, 1974 (E.C. Ex. 14, in part).

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85 / Enforcement Counsel Proposed Finding of Fact No. 26, filed under seal, also concerns this same information.

The Commission policy favoring public accessability to all evidence in this matter absent "unusual and exceptional circumstances when good cause is found on the record" places a very heavy burden on those seeking to deny such public access. The Commission is entitled to scrupulous adherence to this policy by those who implement and enforce it. See generally F.C.C. v Schreiber, 381 U.S. 279 (1965); Graber Manu. Co. v Dixon, 223 F. Supp. 1020, 1023 (D.D.C., 1963). Without a full statement of the reasons for granting final in camera treatment to any of the evidence submitted during the course of the proceedings, a specification of the date on which such in camera treatment is to expire, and a full statement of the reasons for selecting that particular expiration date, no final in camera order may issue. 86/

It is also clear, however, that any decision by the Presiding Officer, or ultimately the Commission, granting in camera protection to evidence submitted is of limited scope and finality. Such a decision would settle the status of this evidence for purposes of this proceeding only; even material protected by a "final" in camera order entered in this proceeding may nevertheless be released by the Commission "subject to the provisions of the Commission's procedures under the Freedom of Information Act." 87/

86/ Rules of Practice, Section 1025.65(b).

87/ Rules of Practice, Section 1025.65(d).

Therefore, in deciding whether Respondents have met their heavy burden, it is important that the inquiry center not only on the evidence at issue and the necessity for secrecy, but also on the role that evidence played in this proceeding. 88/

Respondents, purported showing of "unusual and exceptional circumstances," unadorned even with a supporting affidavit, consists of the following statement by counsel in their Motion:

> The material involves two limited categories of confidential commercial and financial information relating to White Consolidated Industries, Inc. (WCI) and Kelvinator, Inc. (Kelvinator). Both categories of material are of a type which, for competitive or other reasons of substance, are not customarily released by business corporations. None of the material for which in camera treatment is requested relates to the safety issues in this case in which there may be a legitimate interest on the part of those not directly involved, but the material could have great potential significance in the business world for reasons having no relationship to this case. From the total material at the in camera session of July 15, 1975, Respondents are asking continuing and permanent in camera treatment for only very small selected portions.

88/ Thus, whether the Commission, if it ever does receive a request from a member of the public for access to any information protected by a final in camera order in this proceeding, would grant that request or instead invoke its authority under the Exemptions of the Freedom of Information Act, is not an issue before the Presiding Officer, and Respondents arguments concerning the reach of the Freedom of Information Act Exemptions are premature and presented in the wrong forum.

Nor does respondents emphasis on the restrictions of 18 U.S.C. 1905 fare any better. Even information described therein may befreely disclosed "when relevant in any proceeding under this Act." Section 6(a)(2) of the Consumer Product Safety Act.

In Respondents' Supplement to their Motion, counsel added "an example" of what "competitors might conceivably do with the information in question," as follows (emphasis added):

> Just as an example, using the figures at the botton of the page showing comparative balance sheets, a competent financial analyst might well be able to determine costs and margins in the segment of the refrigerator business involved. Costs and margins are customarily regarded as confidential items of information which it is important to keep out of the hands of competitors in order not to reveal the basis and potential for price competition.
>
> Similarly the information on the estimated percentage of total sales by overall white operations represented by Kelvinator sales is a type of information which competitors might well attempt to exploit to the disadvantage of Respondents in financial and merchandising circles.

Providing any further "detail" was eschewed by Respondents, however, as "unproductive," since" this is not the place for writing a Fortune Magazine article on competitive forces at work in this major segment of the manufacturing business."

And with respect to the appropriate date of expiration for any order holding material in camera, a date whose selection by the Presiding Officer must be supported with a "full statement of reasons," Respondents counsel offered only the following:

> In camera treatment for the above material is requested for the indefinite future for the reason that the specific items will continue to be of a confidential nature and it is not possible to estimate at what date, if ever, in the future the material might cease to have need for confidential treatment.

This showing, viewed in isolation, is of course hardly adequate. The presence of information about a corporation, in a proceeding concerning corporations, is neither "unusual" nor "exceptional." Yet, in essence, it is merely because such information is present, which "might" be of interest to competitors, that Respondents seek to set aside this strong Commission policy favoring open records. Nowhere is the injury Respondents fear "clearly defined;" nowhere is it shown to be "serious." See Graber Manu. Co. v Dixon, supra. 89/

89/ Nor, contrary to Respondents' suggestion, would it be appropriate for the Presiding Officer or the Commission to make the principle of open records and open hearings contingent upon the "legitimacy" of the interest the public might have in them, since this "would require a degree of foreknowledge which the Commission does not possess." Crown Cork and Seal Co., 71 F.T.C. 1714, 1717 (1967).