

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of)
)
)

KENTUCKY HOUSEHOLD)
GOODS CARRIERS)
ASSOCIATION, INC.,)

a corporation.)
)

Docket No. 9309

**COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
FIRST SET OF INTERROGATORIES**

Pursuant to Section 3.35 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.35, Complaint Counsel hereby respond to Respondent's First Set of Interrogatories. Complaint Counsel timely submit these Responses within thirty (30) days after service.

General Objections

The following general objections apply to each of Respondent's Interrogatories:

1. Complaint Counsel object to the Interrogatories on the ground of timeliness. Though Respondent's counsel may have provided the Office of the Secretary with Respondent's First Set of Interrogatories ("Interrogatories") by the deadline of October 31, 2003, Complaint Counsel were never served and had no knowledge that Respondent's counsel intended to issue Interrogatories. Additionally, because Respondent's counsel did not provide a copy of the Interrogatories to the Administrative Law Judge ("ALJ") on or by October 31, 2003, the Interrogatories were not file-stamped by the October 31 deadline. Respondent's counsel provided a second copy of the Interrogatories (substantively the same as the First Set) to the ALJ and the Office of the Secretary on November 17, 2003, and upon serving the ALJ, the Interrogatories were first file stamped on that day – seventeen (17) days after the October 31 deadline. However, Complaint Counsel did not receive the Interrogatories until late on November 19, 2003. (See Declaration of Dana Abrahamsen, attached.)

2. Complaint Counsel object to the Interrogatories to the extent that they are excessively broad and burdensome.

3. Complaint Counsel object to the Interrogatories on the grounds that they are vague, ambiguous, and uncertain. Notwithstanding these objections, Complaint Counsel have responded to these Interrogatories as they understand and interpret them. Complaint Counsel reserve the right to amend or supplement their responses should Respondent assert a different interpretation of any Interrogatory.

4. Complaint Counsel's discovery and investigation in this matter are continuing. Although Complaint Counsel undertake no obligation to supplement any of these responses, Complaint Counsel reserve the right to assert additional objections as appropriate, and to amend or supplement these objections and responses as necessary.

5. Complaint Counsel object to these Interrogatories to the extent that they call for the disclosure of material protected by one or more of the following privileges: attorney-client privilege, work product privilege, and law enforcement investigatory records privilege.

Responses to Interrogatories

Complaint Counsel have followed the definitions outlined in the Respondent's First Set of Interrogatories. Complaint Counsel object to each and every interrogatory on the basis of the general objections stated above. Without waiving these general objections, Complaint Counsel provide the following answers:

INTERROGATORY #1

State whether you have any knowledge of any harm suffered by any person as the result of the Kentucky Association's submission of proposed Tariff rates, charges, or other items to the Kentucky Transportation Cabinet.

RESPONSE:

Complaint Counsel object to this interrogatory on the grounds of relevance and work product. Complaint Counsel have knowledge that the Kentucky Association engages in conduct that constitutes horizontal price fixing. The antitrust laws presume that such activity is inherently harmful to competition and is *per se* illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940). Any inquiry into harm suffered is therefore irrelevant to the question of whether the Respondent has violated Section 5 of the Federal Trade Commission Act.

Complaint Counsel also believe that the interrogatory requests the work product of Complaint Counsel. Any knowledge by Complaint Counsel of any harm suffered by any person as the result of the Kentucky Association's submission of proposed Tariff rates, charges, or other items to the KTC is a result of Complaint Counsel's investigation and communications that are protected from discovery unless a substantial showing of necessity or justification is made.

Hickman v. Taylor, 329 U.S. 495, 510 (1947). Under the Commission's rules, work product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without hardship to obtain the substantial equivalent of the materials by other means." 16 C.F.R. § 3.31(c)(3). Any information sought in the Interrogatory is equally available to both the Respondent's and Complaint Counsel.

Subject to and without waiving any objections, Complaint Counsel state that members of the Kentucky Association organize, discuss, and agree to a collective tariff schedule and that the members thus fix rates, charges, and other items for intrastate moving services and products. This collectively set tariff is filed with the KTC for enforcement with the knowledge that state law prohibits members from charging a rate, fare, or charge different from those contained in its Tariff and its supplements. Kentucky intrastate household goods moving consumers are harmed by the rates contained in the collective Tariff and its subsequent enforcement. Documents received from KTC and the Kentucky Association indicate that members of the Kentucky Association have attempted to discount off the prices contained in the Tariff, strongly suggesting that absent the collective Tariff, the rates and charges of various Kentucky Association member movers would be lower than set forth in the Tariff. *See e.g.* KTC 1267-72, KTC 1274-77, KTC 0467-77, KTC 1254-59, KHGCA 3681-82.

INTERROGATORY #2

State whether you have any knowledge of any harm suffered by any person as the result of any conduct alleged in the Complaint.

RESPONSE:

Complaint Counsel object to this interrogatory on the bases of relevance and work product. The Complaint charges that the Kentucky Association engages in conduct that constitutes horizontal price fixing. The antitrust laws presume that such activity is inherently harmful to competition and is *per se* illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940). Any inquiry into harm suffered is therefore irrelevant to the question of whether the Respondent has violated Section 5 of the Federal Trade Commission Act.

Complaint Counsel also believe that the interrogatory requests the work product of Complaint Counsel. Any knowledge by Complaint Counsel of any knowledge of any harm suffered by any person as the result of any conduct alleged in the Complaint is a result of Complaint Counsel's investigation and communications that are protected from discovery unless a substantial showing of necessity or justification is made. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Under the Commission's rules, work product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and

that the party is unable without hardship to obtain the substantial equivalent of the materials by other means.” 16 C.F.R. § 3.31(c)(3). Any information sought in the Interrogatory is equally available to both the Respondent’s and Complaint Counsel.

Subject to and without waiving any objections, Complaint Counsel state that members of the Kentucky Association organize, discuss, and agree to a tariff schedule and that the members thus fix rates, charges, and other items for intrastate moving services and products. This collectively set tariff is filed with the KTC for enforcement, and state law prohibits members from charging a rate, fare, or charge different from those contained in its Tariff or supplements thereto. Members of the Kentucky Association as well as Kentucky intrastate household goods moving consumers are harmed by the submission of the collective Tariff and its subsequent enforcement. Documents received from KTC and the Kentucky Association indicate that members of the Kentucky Association have attempted to discount off the prices contained in the Tariff, strongly suggesting that absent the collective Tariff, the rates and charges of various Kentucky Association member movers would be lower than set forth in the Tariff. *See e.g.* KTC 1267-72, KTC 1274-77, KTC 0467-77, KTC 1254-59, KHGCA 3681-82.

INTERROGATORY #3

State whether you have any knowledge of any claim by any person alleging economic harm by reason of a rate, charge, or other item contained in the Tariff.

RESPONSE:

Complaint Counsel object to this interrogatory on the grounds of relevance and work product privilege. Complaint Counsel has knowledge that the Kentucky Association engages in conduct that constitutes horizontal price fixing. The antitrust laws presume that such activity is inherently harmful to competition and is *per se* illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940). Any inquiry into claims of economic harm is therefore irrelevant to the question of whether the Respondent has violated Section 5 of the Federal Trade Commission Act.

Complaint Counsel also believe that the interrogatory requests the work product of Complaint Counsel. Any knowledge by Complaint Counsel of a claim alleging economic harm is a result of Complaint Counsel’s investigation and communications that are protected from discovery unless a substantial showing of necessity or justification is made. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Under the Commission’s rules, work product is discoverable “only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without hardship to obtain the substantial equivalent of the materials by other means.” 16 C.F.R. § 3.31(c)(3). Any information sought in the Interrogatory is equally available to both the Respondent’s and Complaint Counsel.

Without waiving any objections and to the best of Complaint Counsels' knowledge, Complaint Counsel state that they do not know of any claim by any person explicitly alleging economic harm by reason of a rate, charge, or other item contained in the Tariff. However, documents received from KTC and the Kentucky Association indicate that members of the Kentucky Association have attempted to discount off the prices contained in the Tariff, strongly suggesting that absent the collective Tariff, the rates and charges of various Kentucky Association member movers would be lower than set forth in the Tariff. *See e.g.* KTC 1267-72, KTC 1274-77, KTC 0467-77, KTC 1254-59, KHGCA 3681-82. While these documents may not contain an explicit allegation of economic harm, they strongly suggest that the Kentucky intrastate household goods moving consumers are harmed by the higher prices set forth in the Tariff and that movers themselves may well be harmed by being prevented from competing by offering lower rates to consumers.

INTERROGATORY #4

State whether you have any knowledge of any complaint or claim by any governmental agency or subdivision arising out of or in any way connected to the conduct alleged in the Complaint.

RESPONSE:

Complaint Counsel object to this interrogatory on the grounds of relevance and work product privilege. Complaint Counsel has knowledge that the Kentucky Association engages in conduct that constitutes horizontal price fixing. The antitrust laws presume that such activity is inherently harmful to competition and is *per se* illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940). Any inquiry into complaints or claims by governmental entities is therefore irrelevant to the question of whether the Respondent has violated Section 5 of the Federal Trade Commission Act.

Complaint Counsel also believe that the interrogatory requests the work product of Complaint Counsel. Any knowledge by Complaint Counsel of a claim by a governmental agency or subdivision arising out of the conduct alleged in the Complaint is a result of Complaint Counsel's investigation and communications that are protected from discovery unless a substantial showing of necessity or justification is made. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Under the Commission's rules, work product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without hardship to obtain the substantial equivalent of the materials by other means." 16 C.F.R. § 3.31(c)(3). Any information sought by the Interrogatory is equally available to both Respondent's and Complaint Counsel.

Without waiving any objections and to the best of Complaint Counsel's knowledge, Complaint Counsel state that they do not know of any complaints or claims by a governmental

agency or subdivision arising out of or in any way connected to the conduct alleged in the Complaint.

INTERROGATORY #5

State whether you have any evidence that the rates established by KTC for the intrastate transportation of household goods in the Tariff are greater or different than such rates would be in the absence of the Tariff.

RESPONSE:

Complaint Counsel objects to this interrogatory on the basis of relevance. Complaint Counsel has knowledge that the Kentucky Association engages in conduct that constitutes horizontal price fixing. The antitrust laws presume that such activity is inherently harmful to competition and is *per se* illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940). Any inquiry into whether rates established by KTC would be greater or different in the absence of the Tariff is therefore irrelevant.

Subject to and without waiving any objections, documents received from KTC and the Kentucky Association reveal numerous attempted discounts by members off the rates contained in the collective Tariff. *See e.g.* KTC 1267-72, KTC 1274-77, KTC 0467-77, KTC 1254-59, KHGCA 3681-82. Such discounts strongly suggest that, absent the collective Tariff, these members would charge rates different from and lower than those contained in the Tariff. *See also e.g.* KHGCA 4969-70, KHGCA 9031, KHGCA 9565.

INTERROGATORY #6

State whether you have any evidence of any agreement among members of the Kentucky Association including, without limitation, any agreement to charge the rates and charges contained in the Tariff.

RESPONSE:

The documents submitted by the Kentucky Association are replete with evidence that the members agree on the rates in the Tariff. The evidence shows, among other things, that the rates contained in the Tariff are established by the members by the duly established Tariff Committee. Increases in the established rates are voted on by Respondent's Board of Directors. Members' exceptions to rates are circulated to all the members prior to the time the final rates are submitted to the state. Members know that once the rates are submitted to the state, they will be legally obligated to charge those collective rates after they take effect because Kentucky law prohibits deviation from the rates contained in the Tariff. Moreover, the documents contain evidence that individual members have been desirous of charging individual rates but have been pressured by

the Respondent's officials to continue to charge the collective rates contained in Respondent's Tariff. See e.g. KHGCA 4967-4970.

INTERROGATORY #7

State whether you have any evidence that KTC has failed to actively supervise the program of rate regulation which is the subject of the Kentucky Association's State Action defense.

RESPONSE:

The evidence is full of examples of failure to actively supervise tariff regulation. Without limitation, such evidence includes the documents produced by KTC and the Kentucky Association and the deposition testimony of Mr. Debord, Ms. King, and Mr. Mirus. The evidence demonstrates a general lack of supervision including, but not limited to, KTC's failure to hold hearings to consider rate increases, KTC's failure to issue written decisions approving rates or rate increases, KTC's failure to conduct formal economic analyses of the Kentucky household moving industry, failure to submit reliable economic data to KTC, and failure to establish formal standards for analyzing whether the rates contained in the Tariff satisfy the statutory standards established by the Kentucky legislature.

INTERROGATORY #8

State whether you have any evidence that any person has ever read a newspaper advertisement or other notice regarding tariff rates published in connection with any proceeding before the Oregon Department of Transportation.

RESPONSE:

Complaint Counsel object to this interrogatory on the ground of relevance. Complaint Counsel intend to use documents produced by the Oregon Department of Transportation and the Oregon Draymen & Warehousemen's Association for the limited purpose of demonstrating procedural steps and deliberations a state has undertaken to conduct a financial analysis of the intrastate household goods moving industry in that state. Any evidence of whether people read newspaper advertisements or other notices regarding tariff rates has no bearing on the actions purportedly taken by the state to analyze data, and is therefore irrelevant.

Subject to and without waiving any objections, Complaint Counsel have no actual knowledge of any particular person reading a newspaper advertisement or other notice regarding tariff rates published in connection with any proceeding before the Oregon Department of Transportation. Complaint Counsel is aware of documents produced by the Oregon Draymen &

Warehousemen's Association that indicate that such notice of hearings was provided. *See e.g.* ORE Assoc-0000846, ORE Assoc-0000850-51, ORE Assoc-0000818-823.

INTERROGATORY #9

State whether you have any evidence of the revenues charged or collected by Kentucky Association members in connection with Kentucky intrastate transportation services which are listed in and/or subject to the Tariff.

RESPONSE:

Complaint Counsel do not have evidence of the revenues charged or collected by the members of the Kentucky Association in connection with Kentucky intrastate transportation services which are listed in and/or subject to the collective Tariff. Deposition testimony indicates that KTC did require movers to supply annual financial reports that contained revenue figures in the past. However, KTC officials discontinued this requirement, and therefore neither the Kentucky Association documents nor the documents produced by KTC indicate that such information has been submitted by the members of the Kentucky Association to the state. Documents produced by KTC do provide evidence that members of the Kentucky Association charge for their services and collect revenues. *See e.g.* KTC 1268-72, KTC 1277, KTC 1280, KTC 0519.

INTERROGATORY #10

State whether you have communicated with KTC in an effort to bring about any changes in the KTC regulation of household goods movers.

RESPONSE:

Complaint Counsel object on the grounds of relevance and work product. The Complaint alleges that the Respondent violated Section 5 of the Federal Trade Commission Act. Whether Complaint Counsel have communicated with KTC to bring about changes in its regulation of household goods movers has no relevance to whether the Respondent's conduct violates the FTC Act.

Complaint Counsel also believe that the interrogatory requests the work product of Complaint Counsel. Any communication with the KTC is a result of Complaint Counsel's investigation and is protected from discovery unless a substantial showing of necessity or justification is made. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Under the Commission's rules, work product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without

hardship to obtain the substantial equivalent of the materials by other means.” 16 C.F.R. § 3.31(c)(3).

Subject to and without waiving any objections, Complaint Counsel state that they have been in communication with KTC officials in connection with this proceeding. *See e.g.* KTC 1356, depositions of William Debord and Denise King.

INTERROGATORY #11

State whether you have communicated with representatives of the Commonwealth of Kentucky and/or KTC in connection with this proceeding.

RESPONSE:

Complaint Counsel object on the ground that this interrogatory requests the work product of Complaint Counsel. Any knowledge of communications with representatives of the Commonwealth of Kentucky and/or KTC in connection with this proceeding is a result of Complaint Counsel’s investigation and communications that are protected from discovery unless a substantial showing of necessity or justification is made. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Under the Commission’s rules, work product is discoverable “only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without hardship to obtain the substantial equivalent of the materials by other means.” 16 C.F.R. § 3.31(c)(3).

Subject to and without waiving any objections, Complaint Counsel state that they have been in communication with KTC officials in connection with this proceeding. *See e.g.* KTC 1356, depositions of William Debord and Denise King.

INTERROGATORY #12

State whether you are opposed to the intervention of KTC in this proceeding.

RESPONSE:

Complaint Counsel object on the ground of relevance. Whether Complaint Counsel are opposed to the intervention of KTC in this proceeding does not influence whether the Kentucky Association has and does engage in illegal price fixing, and is therefore irrelevant to whether the Respondent violates Section 5 of the Federal Trade Commission Act.

Subject to and without waiving any objections, Complaint Counsel have no knowledge of a request by KTC for intervention in this proceeding. Complaint Counsel therefore have no reason to form an opinion favoring or opposing such intervention.

INTERROGATORY #13

State whether you have conducted any investigation of intrastate collective ratemaking by household goods movers in States other than OR, KY, AL, MN, MS, and IA within the last five (5) years.

RESPONSE:

Complaint Counsel object to this interrogatory on the grounds of relevance and work product privilege. The Complaint alleges that the Kentucky Association engages in illegal conduct by fixing the rates in Kentucky intrastate household goods moving tariffs among competitors. Whether Complaint Counsel have conducted any investigations of intrastate collective ratemaking by household goods movers in states other than Kentucky is irrelevant to whether the Kentucky Association has violated Section 5 of the Federal Trade Commission Act.

Complaint Counsel also believe that the interrogatory requests the work product of Complaint Counsel. Any investigation of intrastate collective ratemaking by household goods movers in states other than Kentucky is a result of Complaint Counsel's investigation and communications that are protected from discovery unless a substantial showing of necessity or justification is made. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Under the Commission's rules, work product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without hardship to obtain the substantial equivalent of the materials by other means." 16 C.F.R. § 3.31(c)(3).

Subject to and without waiving any objections, Complaint Counsel state that there have been investigations of intrastate collective ratemaking by household goods movers in Alabama, New Hampshire, Indiana, Iowa, Minnesota, and Mississippi. Information regarding these investigations is available in the Federal Register at 68 FR 62597, 68 FR 62606, 68 FR 14234, 68 FR 47568, 68 FR 47571, and 68 FR 62601, respectively. Complaint Counsel also state that they have conducted an investigation of Oregon Draymen & Warehousemen's Association's activities regarding intrastate collective ratemaking by its member household goods movers. Documents regarding this investigation have been produced to Respondent's counsel.

INTERROGATORY #14

State whether you have communicated with any Member of the Kentucky Association or any person associated with any such Member in connection with this proceeding or the investigation which preceded it.

RESPONSE:

Complaint Counsel object on the ground of work product. Any communication with any member of the Kentucky Association or any person associated with any such member in connection with this proceeding or the investigation which preceded it is a result of Complaint Counsels' investigation and communications that are protected from discovery unless a substantial showing of necessity or justification is made. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Under the Commission's rules, work product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without hardship to obtain the substantial equivalent of the materials by other means." 16 C.F.R. § 3.31(c)(3). Respondent's counsel is well-situated to gather such information from its members and associates without resort to the work product of Complaint Counsel.

Subject to and without waiving any objections, Complaint Counsel state that they have communicated with counsel representing the Kentucky Association from the outset of its investigation. Complaint Counsel sent an access letter on July 3, 2002, to which Respondent's counsel responded on July 25, 2002. Complaint Counsel repeatedly invited Respondent's counsel to respond to the concerns raised in the investigation. The Kentucky Association submitted a six page "Position Paper" on September 18, 2002. Complaint Counsel also informed the Kentucky Association on March 19, 2003, that the matter was being considered by the Director of the Bureau of Competition and that Respondent's counsel could make his views known to the Director. This was followed on May 29, 2003, with a telephone call by Complaint Counsel informing Respondent's counsel that the matter was under consideration by the Commission and that Respondent's counsel could make his views known to the Commission. A letter reiterating the substance of the information conveyed telephonically on May 29 was sent to Respondent's counsel on June 3, 2003. Complaint Counsel have been in continuing contact with Respondent's counsel following the issuance of the Complaint. Complaint Counsel also have taken two days of deposition testimony from the longtime Chairman of the Kentucky Association's Tariff Committee.

INTERROGATORY #15

State whether it is your intention to put an end to collective ratemaking activity in Kentucky by movers.

RESPONSE:

Complaint Counsels' intention regarding relief in this matter is set forth in the Complaint. Specifically, Complaint Counsel seeks the relief outlined on Pages 5 and 6 of the Complaint, entitled "Notice of Contemplated Relief." Without waiving any part of the relief contemplated in the Complaint, Complaint Counsel state that they seek an order barring collective ratemaking activity in Kentucky by movers, as stated in the first part of the Commission's Notice of Contemplated Relief:

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that respondent's conduct violated Section 5 of the Federal Trade Commission Act as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including but not limited to:

1. Requiring respondent to cease and desist from preparing, developing, disseminating or filing a proposed or existing tariff that contains collective rates for the intrastate transportation of property or other related services, goods or equipment.

INTERROGATORY #16

State whether you have conducted any investigation which would disclose the harm to the Kentucky moving public which would result from the granting of the relief sought in the Complaint.

RESPONSE:

Complaint Counsel object to this interrogatory on the grounds of relevance and work product privilege. Complaint Counsel have knowledge that the Kentucky Association engages in conduct that constitutes horizontal price fixing. The antitrust laws presume that such activity is inherently harmful to competition and is *per se* illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940). Any inquiry or investigation of harm to the Kentucky moving public resulting from the granting of relief sought in the Complaint is therefore irrelevant to the question of whether the Respondent has violated Section 5 of the Federal Trade Commission Act.

Complaint Counsel also believe that the interrogatory requests the work product of Complaint Counsel. Any investigation conducted by Complaint Counsel into the harm to the Kentucky moving public which would result from granting the relief sought in the Complaint is a result of Complaint Counsel's investigation and communications that are protected from discovery unless a substantial showing of necessity or justification is made. *Hickman v. Taylor*,

329 U.S. 495, 510 (1947). Under the Commission's rules, work product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without hardship to obtain the substantial equivalent of the materials by other means." 16 C.F.R. § 3.31(c)(3). Respondent's counsel is equally suited to conduct an investigation of the harm to the Kentucky moving public which would result from the granting of relief.

Complaint Counsel have knowledge that the relief sought by the Complaint would benefit the Kentucky moving public to the extent that the Complaint seeks to encourage competition and to prohibit activity which is illegal *per se*. The contemplated relief would result in household goods movers setting rates individually, without price fixing. Kentucky intrastate household goods moving consumers are harmed by the rates contained in the Tariff and its subsequent enforcement. Documents received from KTC and the Kentucky Association indicate that members of the Kentucky Association have attempted to discount off the prices contained in the Tariff, strongly suggesting that absent the collective Tariff, the rates and charges of various Kentucky Association member movers would be lower than set forth in the Tariff. *See e.g.* KTC 1267-72, KTC 1274-77, KTC 0467-77, KTC 1254-59, KHGCA 3681-82.

INTERROGATORY #17

Identify all States in which State agencies responsible for regulating intrastate tariff filings of movers exercise "active supervision" with respect to such tariff filings.

RESPONSE:

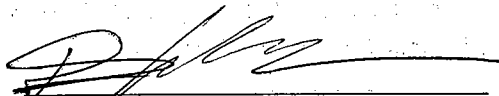
Complaint Counsel object to this interrogatory on the grounds of relevance and work product. The Complaint alleges that the Kentucky Association engages in illegal conduct by fixing the rates in Kentucky intrastate household goods moving tariffs among competitors. The record in this matter will make clear that Respondent's illegal conduct is not shielded by the state action defense involving "active supervision." The identity of other states in which state agencies responsible for regulating intrastate tariff filings of movers exercise "active supervision" with respect to such tariff filings is irrelevant to whether the Commonwealth of Kentucky fails to actively supervise the tariff filings of Kentucky intrastate household goods movers.

Complaint Counsel also believe that the interrogatory requests the work product of Complaint Counsel. Any inquiry that seeks to identify which states with state agencies responsible for regulating intrastate moving tariffs actively supervise such tariffs seeks the result of Complaint Counsel's investigation and communications which are protected from discovery unless a substantial showing of necessity or justification is made. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Under the Commission's rules, work product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation

of its case and that the party is unable without hardship to obtain the substantial equivalent of the materials by other means.” 16 C.F.R. § 3.31(c)(3).

Subject to and without waiving any objections, Complaint Counsel state that they have no knowledge of any determination by any body that any state has taken steps sufficient to “actively supervise” intrastate household moving tariff filings within the meaning of the second prong of the state action doctrine, as set forth in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980), and related cases. Complaint Counsel therefore have not identified any state in which state agencies exercise active supervision with respect to such filings.

Respectfully submitted,



Dana Abrahamsen
Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580
(202) 326-2096
Facsimile (202) 326-3496

Dated: December 2, 2003

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of

**KENTUCKY HOUSEHOLD
GOODS CARRIERS
ASSOCIATION, INC.,**

a corporation.

Docket No. 9309

DECLARATION OF DANA ABRAHAMSEN

I, Dana Abrahamsen, make the following statement:

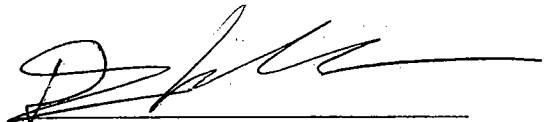
1. I am an attorney for the Federal Trade Commission. I serve as Complaint Counsel in this matter.
2. The Scheduling Order in this matter set October 31, 2003 as the deadline for issuing document requests, requests for admission, and interrogatories.
3. I did not receive any document requests, requests for admission, or interrogatories on or by October 31, 2003.
4. On November 18, 2003, Respondent's counsel asked me whether I had received Respondent's First Request for Admissions, Respondent's First Set of Interrogatories, and Respondent's First Demand for Production of Documents (collectively, "Respondent's First Set of Discovery"). This was the first I had heard of Respondent's First Set of Discovery.
5. I first received Respondent's First Set of Discovery on November 19, 2003. Before this, I did not know that these documents had already been received by the Administrative Law Judge ("ALJ") or the Office of the Secretary of the Federal Trade Commission ("Office of the Secretary").
6. I was first made aware on November 21, 2003 that the Office of the Secretary received a copy of Respondent's First Set of Discovery on October 31, 2003.
7. I was also first made aware on November 21, 2003 that the Office of the Secretary did not

recognize and stamp Respondent's First Set of Discovery as formally received on October 31, 2003 because Respondent's counsel did not provide the Administrative Law Judge ("ALJ") with copies of these documents.

8. The Office of the Secretary first file stamped Respondent's First Set of Discovery as received on November 17, 2003.

I declare under penalty of perjury that the foregoing is true and correct. (28 U.S.C. § 1746).

Executed on December 2, 2003



Dana Abrahamsen


CERTIFICATE OF SERVICE

This is to certify that on December 2, 2003, I caused a copy of the attached Complaint Counsel's Response to Respondent's First Set of Interrogatories to be served upon the following persons by facsimile, U.S. Mail or Hand-Carried:

The Honorable D. Michael Chappell
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

James C. McMahon
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Dana Abrahamsen