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THE WHITE HOUSE
WASHINGTON

July 19, 1975

MR PRESIDENT:

I have taken this letter out
of the normal mail sampling packet.

It seems to be especially
pertinent to your concern for government regulations.
Do you wish a personal reply prepared?

Yes MCJ No _____

Do you wish me to ask the Attorney General
for a report on this situation?

Yes MCJ No _____

Jim Connor



300 ELLISON STREET - HORICON, WISCONSIN 53032
AREA CODE 414 - 485-4463



July 10, 1975

2E
President Gerald R. Ford
President of the United States
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20013

Dear Mr. President:

We, of course, realize that this is being read by an assistant, or an assistant to an assistant, but after the President's speech Tuesday, June 17, 1975, we hoped we might reach someone who would show it to someone who might be able to help.

Each Our plight has been well spelled out in the enclosed articles.

For two and one half years we have been in a constant battle with our government, but we certainly never expected the harassment and delaying tactics we have received from the Justice Department and it's private army, the F.B.I.

Our freedom to exist is threatened by the one government agency that should be protecting our rights.

Please, we beg you, find a way to see that the Justice Department allows us the justice that we were promised in the Constitution, before it is too late.

Most sincerely,

MARLIN TOY PRODUCTS, INC.

Ed Sohmers
General Manager

ES:mb

Enclosures

cc: Senator Gaylord Nelson
Senator William Proxmire
Senator Jesse Helms
Congressman Robert Kastenmeier

regulatory policies flows out of fears of business... themselves that Government is beginning to inter-... much in their affairs.

Walter S. Mitchell, president of Safeway Stores, Inc., the... largest food chain, articulated that concern when he... for an end to "the morass of ever-increasing Govern-... meddling and muddling."

... of the retail-food industry particularly, Mr. ... charged recently that "some publicity-seeking poli-... and Government agencies seem to be trying to turn... customers against us."

... food-chain president added:
 "They seem to want us to end up as either a highly... ated industry or be broken up, or both."

... president John G. Kemeny of Dartmouth College, citing... ensome and often conflicting federal regulations gov-... admission, scholarship and hiring policies, believes... al power may be the most significant threat to higher... ation in the U.S.

... federal agencies seem to be competing with each other... effort to enforce a wide variety of regulations, and... ersities just cannot keep up with them. This red tape... es the administration of educational institutions vastly... complicated.

... he time may come when an institution will have to... itself deliberately in violation of some of these regula-... in order to force a test case in the courts."

... any regulations to which business interests object govern... l concerns—equality in hiring, occupational safety, con-... er welfare and environmental quality.

... y Burch, senior vice president and marketing director of... vinn Bicycle Company, asserts that federal and State

regulatory bodies increasingly are intervening in compan-... internal operations. He adds:
 "Government inspectors with little business expertise ar-... permitted to walk into any company unannounced and... dictate work rules. It's a wonder any product can leave th-... assembly line at a decent price."

Murray L. Weidenbaum, director of the Center for th-... Study of American Business at Washington University in S-... Louis, and a former Assistant Secretary of the Treasury f-... Economic policy, calls these social issues "the new wave o-... Federal Government regulation of business." He explained:
 "No one can quarrel with the motives of bureaucrats i-... trying to improve working conditions, promote better pro-... ducts, eliminate job discrimination and reduce pollution. A-... too often, however, regulators simply ignore the costs of such... advances—costs that frequently outweigh the benefits."

The price of a U.S. auto, he points out, has increased as... average of \$320 per car because of federal safety and... pollution standards. Another study found that federal drug... standards caused delays in bringing effective drugs to th-... market and resulted in extra costs to consumers of between... 200 and 300 million dollars a year.

Much of the thrust of President Ford's campaign to reform... federal regulatory agencies will rest on showing how such... agencies worsen inflation through their policies. Says George... Eads, assistant director of the Council on Wage and Price... Stability:
 "All we are asking is for the regulators to consider their... actions in the spirit of value received for money spent. Since... consumers end up paying the additional price brought on b-... regulatory actions, we want federal agencies to be sure th-... benefits equal the costs to society."

Power to Ruin:

THE COMPANY'S HARROWING EXPERIENCE

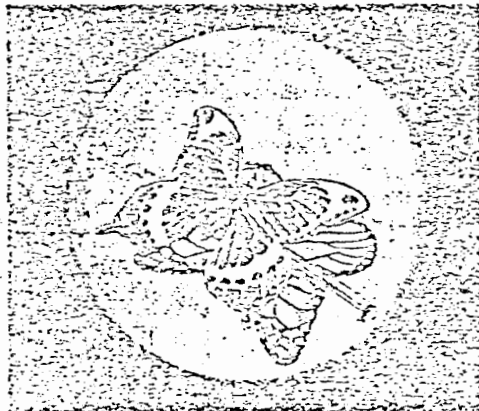
... Schmers knows what it's like to... into the federal regulatory buzz saw... r. Schmers is general manager of... lin Toy Products, Inc., a small manu-... r of a line of toys for infants and... school children located in Horicon... , a farming community of about... 10 persons.

... two years ago, the company em-... ployed 35 persons and was a thriving... enterprise. Today, after a bitter encoun-... ter with the bureaucracy, it is teetering... on the edge of bankruptcy.

"Most powerful ever?" The story... involves the Consumer Product Safety... Commission, once termed "the most... powerful independent regulatory agen-... cy ever created."

... In November, 1972, the Food and... Drug Administration informed Marlin... that the toy plastic balls it manufactured... were unsafe because they contained... toxic butterflies and colored pellets... that could be swallowed by a child if the... balls broke open. The company had nev-... er received a complaint of any harm... caused by the toys since they were... first marketed in 1962.

... At a cost of \$96,000, the company... recalled the balls and removed the pel-... lets with the approval of the FDA.



Bureaucratic error over safety of toy balls drove manufacturer to edge of bankruptcy.

... In 1973, anticipating big holiday sales, Marlin produced hundreds of thousands of the toys, hoping to recover losses.

In the meantime, however, the Consumer Product Safety Commission, which had taken over regulation of toys, published a banned-products list—including the toys Marlin had redesigned months before.

Error admitted, but— The Commission acknowledged a "printing error," but by that time stores all across the country had canceled orders. Marlin lost

a total of 1.2 million dollars, and had to sell its toy lines that had accounted for 65 per cent of its income.

Congress passed a resolution to award the company damages, but the amount has yet to be set by a claims court.

Now, Marlin has laid off all but 10 employees.

"I feel like the captain of a lifeboat," says Mr. Schmers. "I don't know who to kick out next. We are just emotionally drained and demoralized by this experience. We're staying afloat through small contract jobs, but if we don't get a court settlement by the middle of July, we'll just collapse."

"I was just a virgin in the woods in Washington's bureaucracy when this hit us," says Mr. Schmers. "We have been badgered, intimidated, stonewalled and ignored by Government."

Snares in bureaucracy. "Strangely," he adds, "we aren't bitter. People in Government aren't malicious and they don't have evil motives. We found lots of Government officials sympathetic but we just got snared in a bureaucratic mistake, and the system just seemed to be rigged against us."

Now, says Mr. Schmers, he's glad the company fought for its rights.

"I think we will serve as an example to other businesses not to let big Govern-... ment beat them down."

governed according to laws enacted by elected representatives answerable to voters. Today, Americans increasingly find their lives regulated by decrees emanating from bureaucrats who are, in effect, accountable to no one.

The stream of bureaucratic dictates pouring out of Washington has turned into a flood. In 1973, the *Federal Register* needed 35,591 pages to publish all the new decrees and decisions; last year it required 45,422 pages. Random examination of the *Register* suggests how far the bureaucracy has thrust itself into the ordinary business of ordinary people. Navel-Orange Regulation 311, for instance, prescribes how many oranges may be shipped from California and Arizona counties during a specific one-week period. Contractors in Allegheny County, Pa., are informed that their bricklayers must be paid \$9.25 an hour, whereas bricklayers in Adams and York counties, in another part of the state, can receive \$7.65. Arbitrary *Register* regulations may nullify a union contract, require a corporation to spend millions on new equipment, or deny a town the right to approve a new shopping center.

Consumer advocate Ralph Nader points out that senseless or incompetent rulings by federal regulatory agencies drive up prices by suppressing competition, stifling innovation and perpetuating inefficiency. A Senate subcommittee estimates that private business spends \$18 billion annually on paperwork demanded

by federal bureaucrats, while the General Accounting Office calculated that 1973 paperwork cost the government itself \$15 billion. But the gravest consequence of all this bureaucratic meddling carries no price tag. It is eloquently summed up by Sen. Sam Ervin (D., N.C.), Congress' leading constitutional authority, who retired this year after presiding over the Senate Watergate investigation. "Government by bureaucratic decree threatens freedom itself," Ervin declares. "The pursuit of no goal justifies the destruction, or even the erosion, of freedom."

Few Americans would dispute that abolishing racial discrimination, promoting industrial and consumer safety, and cleaning up the environment are worthy goals. The trouble is that Congress has created vast new bureaucracies with sweeping powers to pursue such goals as they see fit. All too often, the results are tragic. Business Buster, Marlin Toy Products, Inc., in Floricon, Wis., used to provide jobs for 85 of the town's 1400 residents. Its most profitable products were two popular toys designed for babies. One was a transparent plastic sphere containing artificial birds and tiny, bright-colored plastic pellets. The other was a similar sphere containing pellets and artificial butterflies. When the spheres rolled, the birds or butterflies fluttered, the pellets rattled and a child enjoyed motion, color and sound.

In November 1972, the Food and Drug Administration (FDA), then responsible for product safety, sud-

denly informed Marlin that the toys were unsafe, reasoning that, if a sphere broke, a child might be tempted to eat the pellets.

Since Marlin first marketed the toys in 1962, millions of Americans had purchased them. Not one had complained to the company of any harmful results. The toys had already passed three rigorous safety tests—Marlin's, an insurance company's and a department store's. Nevertheless, Marlin agreed promptly to recall all the spheres and remove the pellets. Within a month, the FDA said it was satisfied and promised to remove the toys from the next published list of banned products.

Marlin proceeded to manufacture hundreds of thousands of the toys, hoping to recover, through the 1973 holiday sales, the losses from the 1972 recall. But in September 1973 the newly formed Consumer Product Safety Commission (CPSC) issued a "Special Holiday List" of dangerous toys whose sale was prohibited—including the toys Marlin had redesigned months before to FDA satisfaction.

Not until early December did frantic company and Wisconsin officials succeed in getting CPSC to acknowledge that it had made an "editorial error." It was too late. Stores all over the country had canceled toy orders, and Marlin had lost at least \$1.2 million. Today the company is on the verge of collapse.

"Arbitrary . . . Capricious." Congress in 1970 created the Occupa-

tional Safety and Health Administration (OSHA), authority to dictate virtually every segment of business, from the city of Detroit to mom-and-pop rural crossroads. It can walk into an unannounced, search for a warrant and a hearing or trial. It can alike recognize and industrial hazards and intelligent remedial action. OSHA simply makes a nuisance of itself.

In Newport News, Va., OSHA inspector John Boatyard, where "Blackie" Gadarian repairs small craft, without a life jacket. Gadarian, in a boat tied up in a boat tie-up, inspector asked, "pen if he fell in the water." "He would starve," Gadarian replied. "The water is deep all along the shore." inspector thought. Gadarian ladder at the pier. Gadarian said he would nail

Three weeks later, Gadarian notified Gadarian. Gadarian related its ladder recall. 1501.84 (c) (4)—a fine of as much as \$10,000. Gadarian asked to be sent him a 248-page month later. Now Gadarian discover any more. Asked for clarification, Gadarian 48-page supplement

MEMORANDUM
OF CALL

TO:

YOU WERE CALLED BY— YOU WERE VISITED BY—

OF (Organization)

Judice Berg Hansen
office

PLEASE CALL → PHONE NO. CODE/EXT. *X6687*

WILL CALL AGAIN IS WAITING TO SEE YOU

RETURNED YOUR CALL WISHES AN APPOINTMENT

MESSAGE

*she got a copy of
Buchen's letter
from Barry Roth*

RECEIVED BY

T

DATE

8/14/75

TIME

3:50

STANDARD FORM 63
REVISED AUGUST 1967
GSA FPMR (41 CFR) 101-11.6

GPO : 1969 O-48-16-80841-1 222-820

63-108

THE WHITE HOUSE

WASHINGTON

July 28, 1975

MEMORANDUM FOR:

JIM CONNOR

FROM:

PHILIP BUCHEN *R.W.B.*

After reviewing the letter from Marlin Toy Products Inc. to the President and the material developed by the Department of Justice which you sent me with your memo of July 24, I recommend that a letter go out to Mr. Sohmers over my signature as shown on the attached draft.

Whatever may be the injustice done to the Marlin Toy Products, the matter has now moved from the Congress to the Court of Claims and is not a matter on which the President should try to interfere.

Please let me know promptly whether I should send the proposed letter.

Attachment

oh *JSL*
JUL 29 1975

THE WHITE HOUSE
WASHINGTON

July 28, 1975

Dear Mr. Sohmers:

The President has seen your letter of July 10, 1975, and he has asked me to prepare a reply after looking into the nature and status of your claim against the United States.

This claim is before the Chief Commissioner or Trial Judge of the United States Court of Claims, I find, as the result of referrals made by both Houses of Congress for a determination whether Marlin Toy Products, Inc. has either a legal or an equitable claim against the United States and if so, the amount of damages for which the United States was actually at fault.

The pending case was filed by your Counsel on October 11, 1974, I have learned, and is in the pre-trial stage before the Trial Judge where the case is proceeding under pre-trial orders and discovery proceedings pursuant to Rules adopted by the Trial Judge for Congressional Reference Cases. The Congress intended such a procedure to be followed whenever it refers to the Trial Judge of the Court a claim which has been made to the Congress for private relief, because such a referral occurs only when complex issues of fact must be resolved as a prerequisite for relief.

Because this matter is now under the jurisdiction of the United States Court of Claims, where you are represented by Counsel, communications concerning your rights under the rules and procedures of the Court and your entitlement to relief should be between your Counsel and the Trial Judge with proper notice to the Department of Justice. Accordingly, I am sending to your Counsel a copy of your letter together with a copy of this reply.

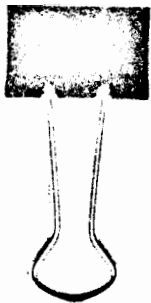
The President appreciates your interest in calling to his attention an example of how government regulatory practices, if not carried out with caution, may result in serious damage.

Sincerely,

Philip W. Buchen
Counsel to the President

Mr. Edward Sohmers
General Manager
Marlin Toy Products, Inc.
300 Ellison Street
Horicon, Wisconsin 53032

cc: Aaron Locker, Esquire



THE WHITE HOUSE
WASHINGTON

July 24, 1975

MEMORANDUM FOR:

PHIL BUCHEN

FROM:

JIM CONNOR 

Attached are some materials relating to a letter written to the President from Marlin Toy Products, Inc.

The President saw the letter and asked that we have Justice look into the circumstances so that a personal reply could be prepared for him. Justice sent back the attached legal memorandum and suggested reply. I am sure that the approach they took is correct in a legal sense. Given the publicity that this situation has already attracted, however, and in light of the President's position on regulatory issues I do not think that the reply is suitable. I understand that we have already received a number of other letters from people inquiring about the U.S. News and World Report article. We are holding these letters until a reply for Mr. Sohmers is prepared.

I would appreciate it if you could try your hand at preparing a response which meets Justice problems but which is also a little more appropriate for the President.

Thanks.



Department of Justice
Washington, D.C. 20530

ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

July 24, 1975

Honorable James E. Connor
Secretary to the Cabinet
Executive Office of the President
The White House Office
Washington, D. C. 20500

Dear Mr. Connor:

Pursuant to your request, I am enclosing a status report on the pending cases of Marlin Toy Products v. United States, Cong. Ref. Nos. 2-74, 1-75. I have reviewed the report and discussed the litigation with the personnel assigned to defend the cases. My conclusion is that the claim presents very complex issues both as to liability and damages. The liability issue concerns whether, in fact, the text of the Banned Products List published by the Consumers Products Safety Commission on October 1, 1973, in any way caused the business decline experienced by Marlin Toy Products. In this respect, evidence developed to date indicates that losses were experienced by Marlin each year since 1969, not just after 1973. Assuming that the evidence were to show that the October 1, 1973 list had some impact on the company's business decline, the damage issue involves a determination as to what portion was attributed to the list, as contrasted with any decline due to general conditions in the toy industry or other factors such as poor management. The enclosed status report notes that, traditionally, Congressional Reference litigation requires detailed trial proceedings and a very thorough Report by the Court to Congress. Cases are not referred to the Court by Congress unless they do present complex issues and this case is no exception. It is being progressed as expeditiously as is feasible under the Court's Rules.



This is simply not a case in which there has been undue delay in bringing the issues to trial. The first of the two cases was filed October, 1974, some nine months ago. If the cases go to trial at the scheduled time next January, this will mean a total lapse between the initial filing date and the trial date of approximately 15 months, which is actually quite good for cases of this complexity.

Apparently the company has determined to try the case both in the press and in the Court, with an emphasis on the press. It is not, however, considered appropriate for the Government to respond in kind. Moreover, as the company is represented by counsel, Aaron Locker, of Aberman, Greene & Locker, 540 Madison Avenue, New York, New York 10022, legal ethics preclude any communication directly with officials of the company on the subject matter of their claim [ABA Code of Professional Responsibility, DR 7-104].

In this circumstance, I am also enclosing a draft of a proposed letter to send in response to that of Mr. Sohmers. Whatever response is made to Mr. Sohmers, however, a copy should be transmitted to the company's counsel.

If we can provide any further information on this matter, we will be pleased to comply.

Sincerely,



REX E. LEE

Assistant Attorney General

Enclosures

UNITED STATES GOVERNMENT

Memorandum

TO : Mr. Rex E. Lee
Assistant Attorney General
Civil Division

FROM : James F. Merow
JFM Chief, Court of Claims Section

DATE: July 22, 1975

SUBJECT: Marlin Toy Products, Inc. v. United States,
Cong. Ref. Nos. 2-74, 1-75

This memorandum is in response to your request, dated July 21, 1975, for a status report in the above-entitled cases.

I. These are Congressional Reference Cases.

1/
The above-entitled cases have been referred by both houses of Congress to the Chief Commissioner [Trial Judge] of the United States Court of Claims pursuant to 28 U.S.C. 2509 for a determination whether Marlin Toy Products, Inc., of Horicon, Wisconsin (Marlin), has either a legal or an equitable claim against the United States, and if so the amount of that claim. 2/ Under the cited legislation it is the responsibility of the Trial Division of the Court of Claims to hold adversary trial proceedings for the purpose of establishing and reporting to both houses of Congress all relevant facts concerning Marlin's claim for relief. On the basis of this report Congress will then make a determination whether private relief legislation should be enacted to grant relief in some amount to Marlin. It is traditional in Congressional Reference cases that full trial proceedings are held and that all relevant facts are developed at trial and reported to Congress. 3/

1/ Two cases exist because each house of Congress has separately referred Marlin's claim to the Chief Commissioner. Marlin's claim in each case is identical, and the cases have therefore been consolidated for all purposes.

2/ Marlin's claim, described in more detail in Section II below, is in essence one of tortious or negligent misrepresentation on the part of the Consumer Product Safety Commission in publishing the October 1973 Banned Products List. Such a claim, if pursued through normal legal channels, would have to be filed in U.S. District Court under the Federal Tort Claims Act, 28 U.S.C. 2671. It would have probably been dismissed as a matter of law, since it is based upon the action taken by a federal agency within the scope of administrative discretion. Thus, Marlin's only effective recourse would appear to be the legislation passed by Congress.

3/ In enacting the most recent version of the legislation authorizing Congressional Reference proceedings, the Senate Report noted as follows, "The committee does agree with the Deputy Attorney General, however, that

[continued]



II. Summary of the Cases

a. The Banning of Marlin's Toys

In November 1972 the Bureau of Product Safety of the Food and Drug Administration performed tests upon the Flutter Ball, 4/ a toy produced by Marlin. As a result of these tests, it was determined that small plastic pellets contained in the Flutter Ball could be swallowed or aspirated by small children in the course of their play. The Bureau of Product Safety accordingly concluded that Flutter Balls containing such pellets present mechanical hazards to children within the meaning of the Federal Hazardous Substances Act, as amended, 15 U.S.C. 1261-1273. In December 1972 the Bureau of Product Safety performed the same tests upon the Birdie Ball, a very similar product produced by Marlin, 5/ and determined that this toy also presents a mechanical hazard to children within the meaning of the Federal Hazardous Substances Act when it contains plastic pellets.

Thereafter, Marlin voluntarily agreed to recall from the market all Birdie Balls and Flutter Balls containing pellets, and to redesign the toys to eliminate the pellets and strengthen the plastic sphere in which

3/ [continued]

general legislation, where feasible, is preferable to private relief legislation, and that Congress should exercise restraint in the utilization of this legislation, referring claims for private relief to the chief commissioner of the Court of Claims only when complex issues of fact must be resolved as a prerequisite for relief." [S. Rept. 1643, 89th Cong., 2d Sess. (1966)].

4/ The Flutter Ball is a clear plastic sphere approximately nine inches in diameter. It contains a plastic bar extending through the diameter of the sphere, on which is mounted a plastic butterfly. When a child rolls the sphere across a floor, the bar rotates inside the sphere, causing the butterfly to spin. The version of the toy tested by FDA in November 1972 also contained a large number of plastic pellets, which caused the toy to make a rattling noise when rolled by a child.

5/ The only difference between the two toys is that on the Birdie Ball a small bird, rather than a butterfly, is mounted on the plastic bar inside the toy.

they were contained. The recall program was initiated in February 1973. It was not entirely effective, and toys containing pellets remained on the market as late as December 1973.

In May 1973 responsibility for the enforcement of the Federal Hazardous Substances Act was transferred from the Food and Drug Administration to the newly-created Consumer Product Safety Commission. On October 1, 1973 the Commission published a Special Holiday Issue of the Banned Products List, the purpose of which was to compile a summary of all previously published Banned Products Lists. This Banned Products List correctly stated that Marlin's Flutter Ball had been banned on November 1, 1972 because it contained "small objects." However, the list also stated that Marlin's Birdie Ball "without plastic pellets" had been banned on December 4, 1972 because it contained "sharp objects." (Emphasis supplied).

Marlin contends that, as a sole result of the listing of these two toys on the October 1, 1973 Banned Products List, it was driven out of the toy business. Marlin contends that, as a direct result of the publication of the October 1973 Banned Products List, it suffered damages in the amount of \$2.4 million.

b. Special Difficulties Presented By The Damages Aspect Of Marlins Claim

The basis for Marlin's asserted \$2.4 million claim against the United States is that the publication of the October 1973 Banned Products List was solely responsible for the failure of Marlin's toy business, and that Marlin's toy business would not have failed but for the publication of the October 1973 Banned Products List. As set forth below, the preparation of a defense to such a claim requires extensive discovery and trial proceedings to determine whether Marlin is correct in its assertions or whether factors other than the publication of the October 1973 Banned Products List led to the failure of Marlin's toy business. On the basis of discovery performed to date, several specific difficulties have already been raised with respect to Marlin's claim.

First, an analysis of Marlin's corporate income tax returns shows that the company was not a profit-making enterprise after March 1969, almost 4 1/2 years prior to the event which prompted its claim. This fact prompts a strong suspicion that Marlin's financial difficulties were well underway prior to the publication of the October 1973 Banned Products List. In fact, these tax returns also show that Marlin's losses increased dramatically in each year from 1969 on, and would appear to indicate a hopelessly failing business enterprise before October 1973.

Second, discovery performed by the United States to date raises the reasonable inference that Marlin suffered from very poor management prior to the publication of the October 1973 Banned Products List. In fact, an appraisal report prepared by the American Appraisal Company of Milwaukee, Wisconsin (which Marlin proposes to offer in evidence at the trial) freely admits that Marlin's president "realized that the company had had several ineffective managers, and accordingly had retained Mr. Sohmers [in January 1973] to take charge of the company and turn it around." (Emphasis supplied).

Third, we consider that evidence may well be obtainable from Marlin's major customers that several serious marketing difficulties very well may have led to a decline in sales of Marlin's toy products independently of the publication of the October 1973 Banned Products List. Among these are serious overpricing of Marlin's products, lack of an aggressive sales force, a lack of diversification of its toy line, serious delays in delivery of Marlin products and a large number of defective items among some of the toys purchased. Finally, contrary to a recent article in U.S. News & World Report, Marlin's books and records do not indicate that its customers cancelled orders for Marlin's toys as a result of the publication of the October 1973 Banned Products List.

III. Procedural History Of The Case

a. Pleadings

On October 11, 1974 plaintiff filed its petition before the Chief Commissioner [Trial Judge] of the United States Court of Claims. After obtaining a litigation report from the Consumer Product Safety Commission, on January 6, 1975 the United States filed its answer to that petition pursuant to the Rules adopted by the Chief Commissioner [Trial Judge] for Congressional Reference cases.

b. Pretrial Conference

On February 11, 1975 counsel for the United States and counsel for plaintiff 6/ appeared at a pretrial conference before Trial Judge Lloyd Fletcher, who has been designated by the Chief, Trial Division, United States Court of Claims, to conduct pretrial and trial proceedings under 28 U.S.C. 2509. The status of the case was discussed, along with the nature of the pretrial procedures which would be appropriate. Counsel

6/ Plaintiff is represented by the New York law firm of Aberman, Greene & Locker. This firm also represents the Toy Manufacturers of America.

for the United States noted that substantial discovery would be necessary in order to develop, for the benefit of Congress, all of the facts relating to liability and damages issues described above.

Immediately after the pretrial conference, Trial Judge Fletcher issued two standard pretrial orders pursuant to Rule 111 of the Rules adopted by the Chief Commissioner [Trial Judge] for Congressional Reference cases. The first order was the Standard Pretrial Order on Entitlement. This order required Marlin to file by March 13, 1975 a complete description of its factual and legal position in the case, along with a listing of both the exhibits which it would propose to offer at trial, and the witnesses who would appear on its behalf at the trial. As is the rule in Court of Claims proceedings, 60 days from the date of the plaintiff's response was set for the United States to file a similar statement responding to that filed by Marlin, setting out the same information with respect to the exhibits and witnesses which the United States would offer at trial.

The second order issued by Trial Judge Fletcher was the Standard Pretrial Order on Accounting. This order required Marlin to file a statement describing in detail the damages which it seeks in the case. The order provided 60 days from the receipt of plaintiff's statement for the United States to perform an audit of plaintiff's books and records and prepare a response. The Government traditionally utilizes the Federal Bureau of Investigation in its pretrial preparation work on all Court of Claims trial cases to perform necessary audits and to locate and interview prospective witnesses.

c. Discovery

Both parties have engaged in pretrial discovery pursuant to the Rules adopted by the Chief Commissioner for Congressional Reference cases. On February 14, 1975, the United States served upon plaintiff an initial set of interrogatories, along with a motion for the production of certain relevant documents in the possession of plaintiff. Trial Judge Fletcher allowed the motion for the production of documents on March 11 over plaintiff's objection.

On March 2, 1975 plaintiff submitted its own set of interrogatories to defendant, and defendant answered these interrogatories fully and completely on April 9, 1975.

On March 31, 1975 plaintiff filed its answers to defendant's first set of interrogatories. After careful analysis and study of these answers, defendant served upon plaintiff a second set of interrogatories on May 5, 1975. These interrogatories were answered by plaintiff on May 30, 1975.

On June 9 through 11, 1975 counsel for defendant traveled to Marlin's offices in Horicon, Wisconsin in order to inspect and make copies of the documents to be made available by Marlin under Trial Judge Fletcher's order of March 11.

On June 23, 1975, after fully analyzing the discovery previously obtained from Marlin, counsel for defendant determined that discovery by way of depositions of certain persons with knowledge of the facts would be needed in order to prepare for the trial. Accordingly, the United States filed on that date a motion for leave to take depositions upon oral examination of the three major executive officers of Marlin and two of the expert witnesses which Marlin has proposed to offer at trial. Defendant further sought to serve subpoenas duces tecum on, and obtain the depositions of, (1) three executive officers of companies which purchased the major toymaking assets of Marlin during 1974, and (2) a Horicon, Wisconsin bank which had extended substantial credit to Marlin prior to the publication of the October 1973 Banned Products List.

The depositions of the executive officers of Marlin are considered necessary in order to prepare the case so that the trial will develop for Congress both an analysis of the business history of the company, and a detailed breakdown of the relevant major business decisions made by the company during its history. The records of Marlin's local bank must be examined in order to prepare the case so that at trial the facts as to the company's financial status prior to the publication of the October 1973 Banned Products List can be presented. The depositions of the expert witnesses who will testify on behalf of Marlin at the trial are necessary in order to allow for a full examination at the trial of the basis for their expert opinions, and to ascertain the need for additional expert testimony or evidence which can provide the basis for an accurate and complete report to Congress. Under the new Federal Rules of Evidence, such depositions of expert witnesses are expected to occur prior to trial. [Rule 705 (Advisory Committee's Note)]. Finally, the depositions of the executive officers of the toy companies which in 1974 purchased the toymaking assets of Marlin are necessary in order to prepare the case so that the trial proceedings will develop the facts needed to fully inform Congress as to the validity of Marlin's claim that these agreements were "forced sales" which would not have been made at a loss but for the publication of the October 1973 Banned Products List.

The Trial Judge has allowed the Government's motion to take depositions only with respect to those persons listed by Marlin as witnesses, and has denied defendant's motion with respect to all other persons. This is considered to be detrimental to the development of facts Congress will require and defendant has filed a motion for reconsideration of this order.

On July 17, 1975 Marlin filed a motion for the production of documents in the possession of the United States. This motion seeks a number of documents relating to the banning of plaintiff's products during the period 1972 to 1973, as well as all interview reports of potential witnesses obtained by defendant in the case. Defendant's response to this motion is currently due on July 28, 1975.

d. Investigative Work by the Federal Bureau of Investigation

In April 1975 the Civil Division of the Department of Justice formally requested that the Federal Bureau of Investigation (FBI) conduct an audit of plaintiff's books and records, as required by Trial Judge Fletcher's Pre-trial Order on Accounting. This audit was performed on an expedited basis by the Milwaukee Field Office of the FBI, and a report was forwarded to the Civil Division on June 12, 1975. This report will serve as the basis for defendant's pretrial submission on accounting, currently due July 22, 1975.

In April 1975 the Civil Division also requested that the FBI interview those companies which purchased over \$250.00 worth of goods from Marlin during the years 1972 and 1973. The names and addresses of such companies had previously been furnished by plaintiff in response to defendant's first set of interrogatories. The purpose of these interviews is to ascertain what facts are available as to whether such companies were in any way affected in their decisions to purchase Marlin's products by the publication of the October 1973 Banned Products List, or whether any factors other than the October 1973 Banned Products List were responsible for the level of purchases made of Marlin products. Development of such information is, of course, one of the reasons why this case was referenced by Congress for trial proceedings and the Report to Congress must deal with the actual effect upon Marlin of the publication of the October 1973 Banned Products List. The interviews are currently being conducted by various field offices of the FBI and should be complete by August 15, 1975. To the extent relevant evidence is indicated from any source interview, it will be presented in the form of testimony at the trial which will ensue.

e. Trial Date

On June 6, 1975 Trial Judge Fletcher set a trial date of September 16, 1975. On June 18, 1975 defendant filed a motion to set the trial date on January 5, 1976. This motion set forth, in detail, the substantial discovery and trial preparation work required before a case of this complexity can be brought to trial in order to obtain the evidence which is necessary for a Report to the Congress. Defendant's motion also detailed the procedural history of the case and demonstrated that the United States has proceeded expeditiously and with great dispatch at every stage of the case. On June 26, 1975 Trial Judge Fletcher allowed defendant's motion

over plaintiff's opposition, and set the trial to commence on January 12, 1976.

IV. Substantial Additional Work Must Be Performed
By Defendant's Counsel Prior To Trial

A large number of tasks must be performed by counsel prior to the commencement of trial. These tasks include the following:

a. Depositions

Defendant must take the depositions of those persons described in Section II above. It is possible that plaintiff's counsel may also wish to take depositions. Depending upon the number of depositions allowed by the Trial Judge or, on appeal, by the Review Panel appointed by the Chief Commissioner [Trial Judge] under 28 U.S.C. 2509, it is contemplated that depositions should be completed by early October 1975.

b. Preliminary Interview and Screening
Of Potential Witnesses

As set forth above, the FBI is currently conducting brief interviews of a number of potential witnesses for presentation at trial. Counsel for defendant is independently interviewing other witnesses whose testimony might be helpful in fully reporting to Congress the facts concerning Marlin's claim. Once these interviews are complete, extensive screening work must be done in order to present a manageable and representative number of such witnesses at trial. It is anticipated that the preliminary interviews of potential witnesses will be complete by August 15, and that counsel for defendant will be able to screen the data produced by the interviews by early September.

c. Preparation of a Pretrial Statement
On Entitlement

Once the basic depositions now contemplated, as well as the preliminary interview and screening of the large number of potential witnesses in the case, have been completed, the Government will have the material needed to prepare and file its pretrial statement on entitlement. Such a statement will set forth the factual and legal propositions which it is anticipated the evidence will support, as well as a listing of the proposed exhibits and witnesses which will be offered at trial. Such a statement is currently due on August 18, 1975, and we consider that at least 30 days of additional time beyond this date will be required.

d. Intensive Economic Analysis Of Data
Produced By Discovery

Once basic discovery is complete, we consider that an expert economic analysis of the data and information so produced will be needed. As noted,

the plaintiff anticipates presenting expert testimony and the Government must do so as well in response. The Civil Division has obtained the assistance of the Antitrust Division for the purpose of preparing such an analysis, since the damages aspect of Marlin's claim is in fact quite similar to the damages aspect of a typical antitrust action. The economic analysis contemplated cannot, however, commence until the basic data is assembled upon the completion of discovery.

The analysis contemplated by defendant will focus on two basic points. First, the apparent mismanagement and erroneous business decisions of Marlin both before and after the publication of the October 1973 Banned Products List must be fully documented and analyzed in order that they might be completely and fairly reported to Congress. Second, Marlin's position within the toy industry, as well as the external economic factors operating on Marlin within the toy industry prior to the publication of the October 1973 Banned Products List, must be fully documented and analyzed. 7/

It is estimated that, if the necessary data and information concerning Marlin can be assembled through discovery by early October, defendant's economic analysis of this data could be completed by early December.

e. Appraisal

Plaintiff has proposed to offer in evidence an appraisal report prepared by the American Appraisal Company of Milwaukee, Wisconsin. We consider that rebutting evidence is needed and the services of an appraisal firm will be retained in order to analyze the appraisal report offered by plaintiff, and the data produced by discovery, to arrive at an accurate and proper appraisal for presentation at trial. We assume the appropriate data can be assembled by discovery by early October and, if so, such appraisal work should be completed by late November.

f. Other Matters

Defendant must, of course, prepare its case on the facts surrounding the banning of Marlin's toys, including the documented safety hazards presented to small children by the banned toys.

7/ Counsel for defendant is currently attempting to obtain access to material on the preschool toy industry recently assembled by the Federal Trade Commission.

V. Final Proceedings

As noted, trial is set for January 12, 1976. Following trial, generally the plaintiff is afforded 60 days to file proposed findings and a brief with the Trial Judge. The Government then has 60 days to file its proposed findings, brief, and objections to plaintiff's findings. A reply is allowed, should plaintiff desire to file one. The Trial Judge then prepares a recommended report to Congress. Under the Rules each party can appeal this Report to the Review Panel, appointed under 28 U.S.C. 2509, which sits as an appellate court and will hear oral argument on the appeal. The Review Panel then prepares the final Report and it is transmitted to Congress. On an expedited basis, it would be exceptional, in a complex case of this nature, if the Report could be transmitted to Congress prior to the summer of 1976. We cannot estimate, for example, how much time the Trial Judge, or the Review Panel, would need to prepare the Reports involved. As an example of the extent of the Reports generally involved, in Concrete Industries (Monier), Ltd. v. United States, Cong. Ref. No. 6-70, the Trial Judge's recommended Report comprised 198 pages. [205 Ct. Cl. 811 (1974)].

Conclusion

The above status report demonstrates that this complex litigation is being progressed expeditiously and with a view toward developing the detailed Report which Congress traditionally demands in Congressional Reference cases. The letter from the general manager of the company sets forth a complete lack of understanding that the company is involved in adversary litigation, and that even should the Court report favorably on entitlement aspects of the claim, still there must be established the full facts involving damages so that Congress would be able to enact private relief legislation in some amount, if any, appropriate to the circumstances. Finally, as the company is represented by counsel it is not considered ethical to communicate directly with its officials on the subject matter of the litigation [ABA Code of Professional Responsibility, DR 7-104], and this should be brought to the attention of those concerned.

D R A F T

Mr. Edward Sohmers
General Manager
Marlin Toy Products, Inc.
300 Ellison Street
Horicon, Wisconsin

Re: Marlin Toy Products, Inc. v. United
States, Cong. Ref. Nos. 2-74, 1-75

Dear Mr. Sohmers:

I have read your letter of July 10, 1975 concerning the above-entitled litigation, and have been informed by the Justice Department that these cases are being handled expeditiously.

The Justice Department is representing the United States in these cases which are pending before the Court of Claims. I understand that you are also represented by counsel. Under these circumstances, communications concerning your claim should be between your lawyers and the Department of Justice. Accordingly, I am sending to your counsel a copy of your letter together with a copy of this reply.

cc: Aaron Locker, Esquire
Aberman, Green & Locker
540 Madison Avenue
New York, New York 10022

THE WHITE HOUSE
WASHINGTON

7/21/75

TO: James Connor
via Trudy Fry

FROM: Judy Entler Berg-Hansen *jeb*

RE: Marlin Toy Products, Inc.

Trudy, per our phone conversation this morning, attached is a copy of our referral to the Attorney General. Roland's referrals to agencies go to the Executive Secretariat of the agency. Our contact at Justice is:

Dorothy Kluge
Asst. Supervisor
Analysis/Classification Unit
187-3172

Pat Byrne in our office does the phone follow-ups to the agencies, and she tells me Dorothy Kluge is very efficient and helpful.

I will let you know when we receive something from Justice. Please call me if you have any questions. Thanks.

x6687
Rm. 411

THE WHITE HOUSE OFFICE

REFERRAL

SENT red tag
by jeb
to Justice
1.p.m. 7/17

To: Attorney General

Date: July 17, 1975

ACTION REQUESTED

- Draft reply for:
 - President's signature.
 - Undersigned's signature.
- Memorandum for use as enclosure to reply.
- Direct reply.
- Furnish information copy.
- Suitable acknowledgment or other appropriate handling.
- Furnish copy of reply, if any.
- For your information.
- For comment.

NOTE

Prompt action is essential.

If more than ~~7~~ ⁴ days delay is encountered, please telephone ~~the undersigned~~ immediately, ~~Sub 452~~ 456-6688, Miss Pat Bryne.

Basic correspondence should be returned when draft reply, memorandum, or comment is requested.

REMARKS:

THE PRESIDENT HAS SEEN. PLEASE RESPOND SUBSTANTIVELY AS SOON AS POSSIBLE.

Description:

Letter: Telegram: Other:

To: The President

From: Ed Schmers, General Manager, Marlin Toy Products, Inc., 300 Ellison Street, Horicon, Wisconsin 53032

Date: 7/10/75;

Subject: Company on verge of collapse. Consumer Produce Safety Commission made a "printing error" in 1973 which caused stores to cancel orders. Congress passed resolution to award the company damages but the amount has yet to be settled by a claims court. Says that for two and one-half years the company has been in a constant battle with government, experiencing harassment and delaying tactic

By direction of the President:

from the Justice Dept. and FBI. "Our freedom to exist is threatened by the one government agency that should be protecting our rights." WONT be justice before it is too late.

Roland L. Elliott
Director of Correspondence

RLE:RLE:JEB:PB:blh

July 21, 1975

739-2001

MEMORANDUM FOR: THE ATTORNEY GENERAL
FROM: JAMES E. CONNOR
SECRETARY TO THE CABINET
SUBJECT: MARLIN TOY PRODUCTS, INC.

*called
Jo-
will call*

The President has read the attached letter of July 10th from Mr. Sohmers, General Manager of the Marlin Toy Products Company. He has asked me to look into the situation so that an appropriate reply may be prepared for him. I would appreciate it if you could have your Department prepare a status report on the situation regarding the Marlin Company and forward it to me by c. o. b. Wednesday, July 23rd.

Encl.