Order suspending proceedings in this case pending the outcome of respondents' motion for a preliminary injunction in the District Court for the District of Columbia.

ORDER SUSPENDING PROCEEDINGS

Upon consideration of the hearing examiner's certification filed March 24, 1966, of the request of complaint counsel for a stay in the proceedings herein in consideration of a stipulation to suspend proceedings filed with the United States District Court for the District of Columbia in *Lakeland Nurseries Sales Corp., et al.* v. *Paul Rand Dixon, et al.,* Civil Action No. 419–66:

It is ordered, That proceedings, including discovery proceed-

ings, in this matter be, and they hereby are, suspended pending a determination by the District Court for the District of Columbia in Civil Action No. 419–66 of a motion for preliminary injunction filed in that court by the respondents.

THE SPERRY AND HUTCHINSON COMPANY

Docket 8671. Order and Opinion, April 15, 1966

Order denying respondent's request for access to confidential and other Commission files relating to the trading stamp industry.

OPINION OF THE COMMISSION

This matter is before the Commission upon the certification of the hearing examiner of respondent's motion dated January 11, 1966, requesting access to documents in the confidential files of the Commission.

The request for production made by the respondent includes, among other things, all written statements, communications, or other documents received by the Commission from September 1962 to the present from third parties, including retailers, trading stamp exchanges and trading stamp companies, responsive to inquiries made by the Commission, relevant to allegations in the complaint; the inquiries by the Commission to which the communications were responsive; depositions taken by the Commission in the same period relating to any of the matters covered by the first request; and, finally, all preliminary, interim, and final studies and reports made by the Bureau of Economics of the Commission for the period September 1962 to the present, relating to such things as the effects or lack of effects on prices and price structures of the use or discontinuance of the use by retailers of bonus, double or multiple stamps.

The examiner recommends partial production under the request, that is, all documents requested in the first item not produced pursuant to his Prehearing Order No. 2 that constitute complaints or explanations by customers of the third party producing the record "in the nature of verbal acts evidencing the existence or effect of the alleged conspiracy, records kept in the ordinary course of business, and documents showing on their face that they constitute prior recollection recorded which evidence the existence or effect of the alleged conspiracy" and such portions of documents described in the second item of respondent's request

"necessary to limit or identify and thus make admissible the documents to be produced in compliance with paragraph 1 hereof."

The examiner has correctly certified the respondent's request for confidential data to the Commission with his recommendations. *L. G. Balfour Company,* Docket No. 8435, orders issued October 5, 1962 [61 F.T.C. 1491], and May 10, 1963 [62 F.T.C. 1541]; *R. H. Macy & Co., Inc.,* Docket No. 8650, order issued September 30, 1965 [68 F.T.C. 1179]; *Viviano Macaroni Company,* Docket No. 8666, order issued March 9, 1966 [69 F.T.C. 1104]. Under the procedure set forth in these cases a request made during the course of a hearing for confidential information in the Commission's files will be treated as an application under § 1.134 of the Commission's Rules of Practice. Section 1.134 provides that the Commission may direct that confidential documents be disclosed to an applicant upon a showing of good cause therefor, and that the Commission, in considering the action to take upon a request for such documents, will give due regard to statutory restrictions, its rules and the public interest.

The documents requested by respondent, to the extent that such are in the possession of complaint counsel or the Commission, are highly confidential. The persons and businesses who supply the kind of information concerned are frequently reluctant to have their affairs made public and they expect, in providing this information to the Commission, that its confidentiality will be maintained wherever possible. In this proceeding the sensitive nature of information received by the Commission is illustrated by the fact that certain nonparties have moved to have material submitted by them be given *in camera* treatment.[1] This consideration, although alone not sufficient to foreclose production if required in the interest of justice and fairness, is significant in weighing respondent's showing of need. Moreover, much of the kind of documentation requested seems to come within the work product category and the Commission has stated that such documents will not be released without a strong showing of special circumstances, good cause or necessity. *Graber Manufacturing Company, Inc.,* Docket No. 8038, order issued December 13, 1965 [68 F.T.C. 1235].

We will consider at this point whether or not respondent has shown good cause. Good cause under § 1.134 of the Commission's Rules has been construed as requiring a showing of real or actual

[1] Motion for leave to intervene and to request *in camera* treatment filed by Merchants Green Stamp Trading Co., January 20, 1966; motion for leave to intervene and to request *in camera* treatment of information filed by Premium Service Corporation, January 28, 1966.

need. See *Viviano Macaroni Company, supra,* and cases therein cited.

Respondent makes two general claims that it has established good cause. The first concerns its specific request for production of certain economic studies. Respondent apparently is of the view that complaint counsel intends to introduce the testimony of an expert witness concerning the effects on prices or price levels of its policy regarding the issuance of one S & H trading stamp for each 10 cents of goods and services. Respondent states, therefore, that if, as it believes, the Bureau of Economics has an economic analysis of the impact of the use of trading stamps on retail prices, such a study is relevant to the charges in the complaint and should be made available to respondent "both for its possible evidentiary value and for use in cross examination of the expert witness upon whom complaint counsel expect to rely." The present prehearing procedure, however, calls for the production of proposed statistical proof with underlying documents in advance of the trial. Thus, respondent will have access to any such study used in ample time to prepare its defense. Internal documents of this kind, if not used, will ordinarily be privileged against disclosure. See *R. H. Macy & Co., Inc., supra.*

Respondent secondly claims that there is good cause for allowing respondent to examine all documents falling within the scope of its motion. It asserts that the three counts in the complaint each alleges practices which respondent denies but that respondent is beset with the practical difficulty of investigating activities, covering many years, of 70,000 retail licensees and some 400 trading stamp companies. Respondent therefore avers that if it is able to examine the relevant documents sought by its motion there will be enormous practical advantages accruing to both the respondent and the Commission. It claims that the time required for investigation and preparation of the defense will be materially shortened, the hearing may commence at an earlier date and proof at trial will be facilitated.

These unsupported assertions are all too general to meet the test of need as required under § 1.134. Respondent has failed to show in any specific way that the documents requested are necessary for its defense. By the hearing examiner's Prehearing Order No. 2, it will receive from complaint counsel substantially all the documents such counsel intend to offer.[2] By the same order,

[2] The examiner states the substance of this part of his order as follows:

"By Prehearing Order No. 2, counsel supporting the complaint will submit on or before March 1, 1966, all documents they intend to offer except underlying documents for statistical proof, statistical studies not yet completed and documents to be used for impeachment or the refreshment of witnesses' recollection. . . ."

provision is made for the submission of the names of witnesses in advance. In addition, statistical proof will be made available in advance of its offer, together with underlying data. The examiner states that in effect complete discovery of the case his adversary expects to present will be made to both parties before the trial of this proceeding.

Since respondent will have pretrial production of the substance of its opponent's case, the production of documents mainly in issue must be those which will fall outside of the records affected by Prehearing Order No. 2. It appears, therefore, that respondent's chief purpose is not to seek specific documents or documents respecting a specific defense which upon analysis might demonstrate good cause. Rather, as the phrasing of its request indicates, it is asking for general access to the Commission's confidential investigational files merely to see whether something useful to its defense may turn up. This is clearly an insufficient ground for the production of such records. Respondent has made no showing of any kind which would constitute good cause for the requested access.

Respondent will be under no disadvantage by a denial of its motion. The examiner has pointed out that both sides will have complete discovery of the case of his adversary and for the respondent this will include access to some, and perhaps most, of the documents involved in its request. Respondent also has available to it appropriate means to conduct its own inquiry.

Considering all the factors, we conclude that respondent's request should be denied in its entirety. An appropriate order will be issued herewith.

Commissioner Elman dissented and has filed a dissenting statement.

DISSENTING OPINION

BY ELMAN, *Commissioner:*

The refusal to give respondent access to the Bureau of Economics' report on trading stamps is inconsistent with a fundamental and paramount function of the Commission. One of the main purposes for which this agency was established was to conduct economic inquiries of the kind which that report reflects, and to make the results of such inquiries available to the public. In the words of President Wilson, it was expected that the Commission would serve as a reservoir of economic data, "an indispensable instrument of information and publicity," "a clearing house for the facts" by which both the public and businessmen

would be guided. To conclude, as does the Commission, that such studies should be sheltered from public scrutiny, and be considered internal memoranda or mere tools to be used in the Commission's investigative and prosecutorial functions, distorts, if it does not destroy, this important role which the Commission was expected to play.

Nor can the Commission's refusal to order production of the report be justified on the grounds that such confidentiality is necessary to maintain a free flow of information between the Commission and its staff or that such reports are "work-products" prepared for litigation. Such justifications misconceive the nature and function of economic inquiries into industry practices conducted by the Division of Industry Analysis of the Commission's Bureau of Economics. The Division's staff consists of professional economists whose obligation is to report data objectively and impartially, letting the chips fall where they may, whether the result is to support or to weaken a position taken by Commission complaint counsel in some adjudicative proceeding. To justify confidentiality on the ground that our economists would not otherwise feel free to submit such factual and impartial reports is to demean their professional status. To keep a report confidential because it conflicts with a position being taken by the Bureau of Restraint of Trade in an adjudicative proceeding would be clearly arbitrary. Such a justification would violate the fundamental principle of justice and fairness which prohibits a Government agency from suppressing documents which may be critical to a respondent in making his defense. See *Brady* v. *Maryland*, 373 U.S. 83, 86–88; *Jencks* v. *United States*, 353 U.S. 657, 667–71; *Roviaro* v. *United States*, 353 U.S. 53, 60–61.

The public interest in disseminating the facts contained in the Bureau of Economics' report on trading stamps, as well as respondent's special need for the report in preparing its defense, require that production be ordered.

ORDER RULING ON QUESTION CERTIFIED

This matter having come before the Commission upon the certification of the hearing examiner of respondent's motion filed January 11, 1966, requesting access to documents in the confidential files of the Commission, and the Commission having determined, for the reasons set forth in the accompanying opinion, that the respondent's request should be denied:

It is ordered, That respondent's request for access to confidential documents in the Commission's files be, and it hereby is, denied.