

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
ET AL.

Docket 8866. Order, January 6, 1972

Order compelling, with the written approval of the Attorney General of the United States, witness Joseph F. Malone to give testimony and such other information as required by the hearing examiner.

ORDER COMPELLING TESTIMONY

This matter having come before the Commission upon the hearing examiner's certification of complaint counsel's request for an appropriate ruling on the refusal of Joseph F. Malone to testify in response to a subpoena (in connection with the taking of a deposition) on the basis of a claimed privilege against self-incrimination under the Fifth Amendment of the United States Constitution; and

The Commission having determined that in its judgment (1) testimony or other information from Joseph F. Malone may be necessary to the public interest and (2) such individual has refused to testify on the basis of his privilege against self-incrimination; and, further, that in the circumstances of this case it would be appropriate for the Commission to issue an order requiring the testimony of such individual:

It is ordered, That pursuant to the provisions of Title 18 U.S.C. 6001, *et seq.*, Joseph F. Malone is hereby ordered, with the written approval of the Attorney General of the United States (Commission Exhibit for Identification 165), to give testimony and provide such other information as may be specified by the hearing examiner, this order to become effective as provided in Title 18 U.S.C. 6002.

GENERAL MILLS, INC.

Docket 8836. Order and Opinion, February 10, 1972

Order denying third party appeals, motions to quash or limit subpoenas *duces tecum* and request for oral argument.

ORDER AND OPINION DENYING THIRD PARTY APPEALS

This matter is before the Commission upon third party appeals from the hearing examiner's rulings on the record on January 3, 1972, denying motions to quash and to quash or limit subpoenas *duces tecum*. The various appeals are as follows: Mrs. Paul's Kitchens, Inc., (Mrs. Paul's) filed January 13, 1972; Coldwater Seafood Corporation, (Coldwater) filed January 17, 1972; and the jointly sub-

mitted appeals of O'Donnell-Usen Fisheries Corp., Seafood Kitchens, Inc., Maine Fisheries Corp., and Rubenstein Foods, Inc., filed January 14, 1972. Respondent, General Mills, Inc., on January 25, 1972, filed its brief in opposition to the appeals.

The subpoenas here in question are part of a group of some 185 or 190 which respondent caused to be issued in connection with its discovery.¹ This group included some 157 "short form" subpoenas which were largely devoted to obtaining data with respect to market definition and market shares. Additionally, some 28 so-called "long form" subpoenas were served on firms assertedly in the retail and institutional markets. These seek the same market share data as contained in the short form subpoenas and in addition certain other information such as advertising data and financial data.²

Motions to quash were filed with the hearing examiner by 10 recipients of these subpoenas. Oral argument was heard before the examiner January 3, 1972. Certain of the movants withdrew their motions at this hearing; the motions of the remaining movants were denied. It is from these rulings of the hearing examiner that the appellant third parties herein are making their appeals.

One of the appealing parties is Mrs. Paul's. This appellant has withdrawn its objections to a number of the specifications and appeals only from the hearing examiner's denial of its motion to quash with respect to specification items 2, 4, 10, 11, and 12. Mrs. Paul's describes items 2, 4, and 11 as being directed to the production of information relative to the operation and profitability of Mrs. Paul's. It contends that this information is irrelevant to the issues raised in the complaint and further that respondent has the data that it needs from such other sources as a Section 6(b) survey conducted by the Commission and stated government statistical surveys. Mrs. Paul's also contends that item 10, seeking information as to costs, and item 12, seeking information as to future plans, are irrelevant. As to all items, Mrs. Paul's makes a claim of confidentiality and asserts that possible disclosure will harm it competitively.

Another appellant is Coldwater which asserts that the information sought has not been shown to be material and relevant for the preparation of respondent's defense. Its argument seems to be that respondent has already received information from over 96 percent of

¹ Complaint counsel generally opposed the issuance of these subpoenas, but upon such counsel's request to appeal on the subject, the Commission, in an order issued January 6, 1972, held there was no basis for determining that the hearing examiner had abused his discretion in the matter and denied the request.

² Although the record does not expressly show which of the forms the various appellants received, it is assumed that such were the long forms. In at least one instance the subpoena including specifications is attached to the motion to quash. (See motion filed by Rubenstein Foods Inc., December 12 1971.)

the industry and that additional data from Coldwater would be superfluous. It also asserts that the protective order of the hearing examiner would be inadequate to prevent the disclosure of this material to its competitors.

The final appeals are those of O'Donnell-Usen Fisheries Corp., Seafood Kitchens, Inc., Maine Industries Corp., and Rubenstein Foods, Inc.³ These appellants, through their counsel, have emphasized the confidential nature of the material requested. They assert that the material, or some of it, would not be relevant to the allegations in the complaint and to probable defenses. They also argue that in spite of the protective order they would be harmed by what they believe would be the disclosure of confidential information to their competitors.

The main thread running through all of the appeals is an objection to furnishing assertedly confidential information which it is feared may fall into the hands of competitors to the injury of the appellants. The hearing examiner was fully aware of this concern. On December 16, 1971, he issued an order granting confidential treatment to the subpoenas *duces tecum* which he later modified by an order issued January 6, 1972. The modified order was issued following the hearing on the objections to the subpoenas on January 3, 1972. The amended order specifies that only outside counsel and named independent economic experts retained as advisers or expert witnesses are permitted to view the responses. Respondent's internal counsel, Richard A. Soloman, Esq., is authorized to review only summaries prepared by the experts. To additionally protect the confidentiality of the information on certain forms the data is to be submitted under code number, the key to which will be revealed only to outside counsel, complaint counsel, and the hearing examiner. Other procedures provided in the protective order assure a reasonable safeguarding of the confidentiality of the responses.

The examiner here has made the determination in effect that the information sought by the subpoenas is relevant and that respondent is entitled to this discovery. He has issued a highly restrictive protective order which will provide, so far as it is practical, protection against disclosure of the subpoenaed data to competitors. This is a discovery area in which the hearing examiner is given a large amount of discretion. There has been no showing that the interests of justice would require that his rulings on these subpoenas be reversed. Accordingly,

³ Respondent asserts in a footnote on page 6 of its Brief in Opposition to Appeals that Rubenstein Foods, Inc., has filed a satisfactory response to the subpoena.