

Interlocutory Order

90 F.T.C.

IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 8934. Interlocutory Order, Nov. 10, 1977

Granting in part and denying in part of motion by complaint counsel for leave to modify pending application for interlocutory review and to obtain expedited decision on modified application.

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINT
COUNSEL'S MOTION FOR LEAVE TO MODIFY PENDING
APPLICATION FOR INTERLOCUTORY REVIEW AND TO OBTAIN AN
EXPEDITED DECISION ON THE MODIFIED APPLICATION

Complaint counsel on February 20, 1976, filed with the Administrative Law Judge a motion for issuance of subpoenas *duces tecum* to respondents. The motion exceeded 1,800 pages and included approximately 700 numbered specifications¹ which, according to complaint counsel, "request[ed] a vast number of documents' quite likely numbering in the millions or tens of millions."² This was to be complaint counsel's first effort to secure documents of a substantive nature from respondents. In July 1976, respondents filed individual and joint objections to the motion and in September complaint counsel filed a reply which included a revised subpoena request. The reply contained 950 pages, including over 300 pages of specifications, definitions and instructions and 300 pages of analyses thereof. The revised request was hardly the shadow of complaint counsel's former request; it contained approximately 550 numbered specifications.³

By his order of November 11, 1976, the ALJ questioned the practicality of complaint counsel's discovery strategy. He noted that complaint counsel had made "what appear to be plausible arguments why the various avenues of investigation would or might produce relevant information or might be fruitful in uncovering leads to relevant information. However, when all of the avenues of investigation are taken together they add up to an overwhelming and unreasonable burden upon respondents and an unmanageable case."⁴ Accordingly, he denied a major portion of complaint counsel's motion but authorized the issuance of more limited subpoenas calling for the production of introductory materials concerning

¹ Order Denying Major Portion of, but Granting in Part, Complaint Counsel's Motion for Issuance of Subpoenas Duces Tecum to Respondents and Establishing Guidelines as to any Further such Motions, November 11, 1976, at 5.

² Motion by Complaint Counsel for Issuance of Subpoenas Duces Tecum to Respondents, February 20, 1976, at 10.

³ Order, November 11, 1976, at 8, 20.

⁴ *Id.* at 24.

respondents' structure and operations and certain documents filed with other government agencies.⁵

In their motion for reconsideration, complaint counsel again modified their discovery request, agreeing to convert all interrogatories to document requests, to delete specifications that referred to transcript pages⁶ and to alter the forward cutoff date for documents to be produced.

As the Judge noted in denying the motion for reconsideration, the specifications "are so burdensome, particularly with respect to the time it would take to comply, that, considering also other future discovery steps proposed to be taken by complaint counsel, the end of discovery could not realistically be envisioned and a trial date could not be realistically predicted, except to predict that it would be far off in the future."⁷ The Law Judge, pursuant to Section 3.23(b) of the Rules of Practice, granted complaint counsel's request for permission to file an application for interlocutory review.

In January 1977, complaint counsel filed their application for review and respondents filed their answers. While complaint counsel's voluminous subpoena application was pending review by the Commission, they moved, on September 28, 1977, that the Commission refrain from ruling on the hundreds of individual specifications in order that they might submit to the ALJ a shorter, less burdensome and more manageable subpoena.⁸ The motion before us asks essentially that complaint counsel be permitted to withdraw the subpoena. We grant that motion, without prejudice.

Complaint counsel also request that the Commission:

- (1) instruct the ALJ that the burden of complying with Commission subpoenas should be evaluated in light of offers by complaint counsel to screen documents;
- (2) instruct the ALJ that he has authority under the rules to require the type of subpoena compliance conditions and controls proposed by complaint counsel;
- (3) rule that complaint counsel in their forthcoming revised information request, are entitled to substantial discovery into post-complaint events

⁵ The subpoenas issued on November 24, 1976. The Commission declined respondents' request that it review the subpoenas on an interlocutory basis. Order Denying Request for Interlocutory Review, March 8, 1977 [89 F.T.C. 168]. On July 26, 1977, the Commission commenced a proceeding to enforce the subpoenas against five respondents that declined to produce certain documents and one that declined to produce any. *FTC v. Anderson*, Misc. No. 77-0161 (D.D.C.).

⁶ Many specifications requested all documents referred to by a particular witness during the course of depositions and interviews. The ALJ ruled that "respondents would be required to comb almost 13,000 pages of depositions and interviews. . . to find some 3,315 pages or portions of pages which purport to describe required documents. . . ." Order, November 11, 1976, at 46.

⁷ Order Denying Complaint Counsel's Motion for Reconsideration. . . , December 22, 1976, at 10.

⁸ Seemingly conceding the wisdom of the ALJ's November 11 order, complaint counsel assert that "[t]he returns on the nonsubstantive November 24 subpoenas duces tecum have afforded us for the first time an opportunity to make reasonably informed reductions in our substantive document discovery requests." Complaint Counsel's Motion for Leave to Modify Pending Application. . . , September 28, 1977, at 6.

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including the current activities of respondents reflected in respondents' active or working files; and

(4) direct the law judge to adopt an expedited time-table for the filing of respondents' opposition, if any, to complaint counsel's forthcoming revised document subpoena proposal and for prompt commencement of respondents' compliance with, or early announcement of any intended noncompliance with, the resulting subpoenas issued by the ALJ.

We reject the argument advanced by several respondents that the requests have been mooted by complaint counsel's withdrawal of their subpoena specifications. The issues presented by these requests are almost certain to be raised by any new specifications. All but one of the respondents also assert that these issues are not now properly before the Commission and that the ALJ must be afforded an opportunity to decide them in the context of the revised specifications. In view of their importance, however, we believe it appropriate to provide the parties and the ALJ some guidance as to our thinking on the issues raised by the first two requests. Since we will not be considering the propriety of specific discovery provisions, these issues can be addressed without reference to the forthcoming subpoena application.⁹

The first two requests concern the ALJ's authority to provide for discovery methods not explicitly sanctioned by the Rules of Practice.¹⁰ In *Century 21 Commodore Plaza, Inc.*, CCH Trade Reg. Rep. para. 21,276, at 21,177 (89 F.T.C. 108, 1977), the Commission held that access orders are authorized by the F.T.C. Act and that the Administrative Law Judges may issue such orders under Rule 3.42(c). We believe that the law judges are likewise authorized to impose production procedures designed to assure orderly compliance with subpoenas. Cf. *Ash Grove Cement Co.*, 77 F.T.C. 1660 (1970).¹¹

We do not mean to suggest, however, that the Administrative Law

⁹ Except perhaps for the fourth issue, we believe that these issues are fairly within the scope of the ALJ's December 22, 1976, certification under Rule 3.23(b).

¹⁰ The ALJ, in assessing the burden of complaint counsel's requested discovery, refused to consider an alternative order advanced in their reply on the grounds that it amounted to an order directing access to respondents' files and that such orders are not authorized by our Rules of Practice. We are inclined to agree with the ALJ's characterization of this proposal although not with his conclusion that such orders are not authorized by the Rules of Practice.

¹¹ In support of his holding that he lacked authority to impose the production controls suggested in a second alternative order proposed by complaint counsel, the ALJ cited language in a footnote to Rule 3.34(b)(2) and also in a notice of proposed amendments to the Commission's discovery rules, 40 F.R. 15239 (1975), stating that the Rules of Practice do not provide for requests, or orders, for production of documents as an alternative method of discovery. Order, November 11, 1976, at 40.

We do not believe that these statements are inconsistent with the issuance of an order imposing controls essential to orderly compliance with a subpoena. The Commission in 1967 rescinded a rule authorizing production orders because proper use of the newly adopted rules authorizing subpoenas *duces tecum* to parties during pre-trial discovery "ma[de] the use of such orders superfluous." *All-State Industries of North Carolina, Inc.*, 72 F.T.C. 1020, 1023 (1967). Until 1967, the production order was, in effect, the pre-trial equivalent of the subpoena *duces tecum*. Although "orders for the production of documents" are no longer to be employed in view of the availability of subpoenas, we do not believe that the imposition of necessary compliance controls is precluded.

Judges are free to allow discovery by any method they deem expedient. Discovery should ordinarily be by the methods described in the Rules of Practice. Only where necessary to the conduct of "fair and impartial hearings. . . [and] to avoid delay in the disposition of proceedings," Rule 3.42(c), may the law judges resort to discovery methods not explicitly sanctioned by the Rules. Moreover, the Administrative Law Judges may not depart from the specific requirements of applicable rules and any orders they issue must, of course, be authorized by the F.T.C. Act.¹²

We see no reason to address complaint counsel's third request. The ALJ has already ruled that complaint counsel are entitled to discovery of post-complaint materials. Determination of appropriate forward cutoff dates should be left to the Law Judge's discretion based on his review of the revised specifications.

Nor have complaint counsel offered sufficient justification for their fourth request. While we hope that the revised specifications can be decided expeditiously, there has been no showing of the ALJ's unwillingness to adopt an appropriate timetable for disposition of complaint counsel's forthcoming subpoena proposal. Moreover, since complaint counsel's proposal is not before us, and, indeed, has apparently not been completed, we have no basis for determining what would be an appropriate timetable for a decision by the ALJ on the revised specifications or for compliance with any specifications he upholds.¹³

We are unwilling to assume that cases involving complex issues and large industries are incapable of efficient adjudication. We believe that complaint counsel's determination to submit a "more manageable subpoena"¹⁴ is a step in the right direction. This, together with the use of discovery procedures tailored to the needs of complex litigation¹⁵ and close adherence to the suggestions set forth in the Manual for Complex Litigation, including continued efforts by the Law Judge to maintain firm control of the proceeding,¹⁶ will

¹² Assuming that, in the circumstances of this case, an access order would be appropriate, the ALJ's assessment of the burden of complaint counsel's request obviously should take into account any reduced burdens resulting from their screening of respondents' files. Cf. *Hunt Foods and Industries, Inc. v. FTC*, 286 F.2d 803, 810-12 (9th Cir. 1960), cert. denied, 365 U.S. 877 (1961). We do not decide whether access orders or compliance controls should be imposed in this case, much less the question of the sorts of provisions that would be appropriate.

¹³ Complaint counsel have also suggested that the Commission "authorize complaint counsel to undertake phased document and data discovery commencing with an initial, vastly reduced subpoena duces tecum as outlined" in their motion. Motion at 9. Complaint counsel do not need Commission authorization to file a revised request with the ALJ and we do not understand complaint counsel to request us to endorse a subpoena we have not seen.

¹⁴ Motion at 6.

¹⁵ Pp. 4-5 *supra*.

¹⁶ See *Manual*, §1.10 (CCH 1973). The ALJ's efforts to control this case have been frustrated by the parties' numerous appeals to the Commission. We have entertained this appeal solely to indicate our belief that the Rules of Practice afford the trial judge broad power to manage this complicated case forcefully and efficiently. This order

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enable this case to be adjudicated in the foreseeable future.¹⁷

It is so ordered.

should not be understood to signal an inclination to review rulings that are best left to the responsible judgment of the ALJ. See, e.g., *Exxon Corp.*, 85 F.T.C. 404 (1975).

¹⁷ The Commission denies the request of Texaco Inc. that we suspend the pending subpoena enforcement proceeding. Assuming that they are now properly before us, we also reject suggestions made by various respondents that we withdraw the case from adjudication or otherwise terminate it.

IN THE MATTER OF
BRISTOL-MYERS COMPANY, ET AL. - D. 8917
AMERICAN HOME PRODUCTS CORPORATION, ET AL. -
D. 8918
STERLING DRUG INC., ET AL. - D. 8919

Dockets 8917, 8918, 8919. Interlocutory Order, Nov. 11, 1977

Order remanding to the administrative law judge an order by him denying *in camera* treatment of certain documents with instructions to grant *in camera* status only to those documents meeting the criteria set forth in the accompanying Commission opinion.

General Foods Corporation applies for review of the administrative law judge's June 28, 1977 order denying its motion for *in camera* treatment of certain documents. The law judge has determined that interlocutory review would be appropriate under Commission Rule Section 3.23(b). We entertain this appeal to clarify the standards as to when *in camera* treatment is warranted.

The Commission's Rules, Section 3.45(b), provide that *in camera* treatment should be granted only in those unusual and exceptional circumstances when good cause is found on the record. It is well established that the person or corporation whose records are involved can satisfy this burden only by demonstrating that public disclosure of the documents will result in "clearly defined, serious injury." *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

In this case, General Foods Corporation contends that it will sustain serious injury because disclosure of these documents will provide competitors with the benefits of its research concerning consumer attitudes toward caffeine. In our opinion, however, documents should not be sealed simply because an applicant asserts that its competitors would like to possess the information the documents contain. General Foods Corporation did not provide answers to such fundamental questions as what in rough terms these studies cost, or whether their competitors could replicate them today and at what cost. More importantly, it did not demonstrate that these studies are significant today. Therefore, we conclude that General Foods has not yet demonstrated on the record that public disclosure of these documents will result in serious injury.¹

We are impressed with the possibility, however, that the docu-

¹ Nor is it relevant that General Foods Corporation relied on complaint counsel's promise to support General Foods Corporation's motion to limit access to respondent's counsel. That promise pertained only to those portions of the documents not introduced into evidence, but given to respondent's counsel for purposes of cross-examination. As the law judge points out there has been no agreement by complaint counsel not to offer these documents as a

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