

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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ments in question may warrant *in camera* treatment. General Foods Corporation does state that the efforts of several of its employees and outside consultants, and significant marketing outlays, were involved in producing this research. It also maintains that this research is relevant to marketing non-caffeine coffee today and that its competitors would also find it useful. It has raised doubt in our mind as to the possibility that it will incur serious injury. For this reason, we remand this matter for further consideration, with the following guidance as to what constitutes "good cause" in terms of Section 3.45(b).

We do not believe that everything that is loosely called a trade secret in the world of commerce necessarily meets the standard that disclosure will result in serious injury.² We cannot accept the logic of General Foods Corporation's argument that its research falls under the "trade secrets" rubric and therefore, should be accorded *in camera* treatment regardless of any discussion of the seriousness of the injury. On the contrary, to warrant *in camera* treatment it must be shown that public disclosure of research, as in this case, or of any allegedly confidential business information will result in clearly defined serious injury. This standard reflects the balance the Commission has struck between the need for a public record and the danger of discouraging business from producing and retaining socially valuable information. The "serious injury" standard is appropriate because the latter danger can only arise when the documents in question are secret and material to the applicant's business, and would less likely be produced if it were known that they had to be publicly disclosed. In all other circumstances, disclosure will not cause serious injury and secrecy would have to give way to the strong Commission policy favoring a public record.

Accordingly, we believe demonstrating serious injury requires the applicant to show that the documents are secret, that they are material to the applicant's business and that public disclosure will plausibly discourage the future production of such information. We find the Restatement of Torts to be instructive regarding the first two criteria. The following factors should be weighed in considering both secrecy and materiality:

- (1) the extent to which the information is known outside of his business;
- (2) the extent to which it is known by employees and

part of the public record. Moreover, the public policy behind an open record is no less important, where complaint counsel does not oppose *in camera* treatment. See, *National Dairy Products Corporation*, 64 F.T.C. 1441, 1442 (1964); and *Crown Cork & Seal Company, Inc.*, 71 F.T.C. 1714, 1716 (1967).

² We need not consider "trade secrets" as defined by 15 U.S.C. 46(f) because that exception to §46(f) is inapplicable to adjudicative proceedings. See *Hood* at 1188-89.

others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Restatement of Torts §757, Comment b at 6 (1939).

We would add that when considering (4), the value of the information, the law judge should place a greater burden on the applicant when the information is old. Regarding the final criterion, the law judge should consider whether the production of the information is required by law or whether the information would otherwise have been produced and retained regardless of whether it was to be publicly disclosed. Also, we note that wherever it would not defeat the purpose of the application, the applicant should demonstrate good cause using the most specific information available.

In ruling on requests for *in camera* treatment the law judge should also consider the strength of the policies favoring disclosure in the particular factual context. Thus, the general and fundamental policy favoring government decisions based on publicly available facts may warrant different treatment for similar information depending upon the importance of the information to an understanding of the Commission's decisionmaking processes. Taking this approach, it may be reasonable in some cases, as Commission Rule 3.45(a) allows, for the law judge to grant *in camera* treatment for information at the time it is offered into evidence subject to a later determination by the law judge or the Commission that public disclosure is required in the interests of facilitating public understanding of their subsequent decisions.

We note, to avoid confusion, that this appeal does not present questions regarding the terms or the advisability of any *in camera* order that might issue. Compare *Mississippi River Fuel Corporation*, 69 F.T.C. 1186 (1966); *F.T.C. v. Crowther*, 430 F. 2d 510 (D.C. Cir. 1970); *Ash Grove Cement Co.*, 77 F.T.C. 1671 (1970); *Eaton Yale & Towne, Inc.*, 79 F.T.C. 998 (1971); and *Pepsico, Inc.*, 83 F.T.C. 538 (1973).

Finally, consideration of the above factors, like other questions relating to the proper, fair and expeditious conduct of adjudicative hearings is a matter within the sound discretion of the administrative law judge.

Because the administrative law judge did not consider and could not have anticipated many of these issues, this matter should be and

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it will be remanded to the law judge for reconsideration of his order denying *in camera* treatment. In so disposing of the appeal, we intimate no view on whether said documents should in fact be afforded *in camera* treatment.

ORDER REMANDING CASE

This matter having been heard and considered by the Commission upon the interlocutory appeal filed by General Foods Corporation from an order of the administrative law judge denying *in camera* treatment, and the Commission for reasons stated in the accompanying opinion having determined that General Foods Corporation failed to demonstrate good cause for *in camera* treatment.

It is ordered, That this proceeding be, and it hereby is, remanded to the law judge with instructions that he grant *in camera* status only to those documents which upon reconsideration, after the parties have been afforded an opportunity to present their views thereon, appear to warrant *in camera* protection in accordance with the Commission's views as expressed in the accompanying opinion.

IN THE MATTER OF
THE KROGER COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 9040. Complaint, June 24, 1975 — Decision, Nov. 11, 1977

This consent order, among other things, requires a Cincinnati, Ohio retail food store chain to make each of its advertised items readily available for sale to customers in its stores, to have advertised items correctly priced, and to sell those items at or below the advertised price. Further, the firm must post copies of advertisements and notices of the availability of "rainchecks" for unavailable items.

Appearances

For the Commission: *Robert Eliot Easton, Charles L. Hall and James J. Angelone.*

For the respondent: *Murray H. Bring, Robert Pitofsky, Peter K. Bleakly, Thomas D. Nurmi and M. Jean Anderson, Arnold & Porter, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Kroger Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

COUNT I

(Alleging violation of Section Five of the Federal Trade Commission Act)

PARAGRAPH 1. Respondent, The Kroger Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio with its office and principal place of business located at 1014 Vine St., Cincinnati, Ohio.

PAR. 2. Respondent through its wholly-owned subsidiaries is engaged in the operation of a chain of retail food stores, operating approximately 1,258 stores in 20 states. Its volume of business is substantial, totaling approximately 3.8 billion dollars in retail food