

IN THE MATTER OF
AMERICAN HOME PRODUCTS CORPORATION, ET AL.

Docket 8918. Interlocutory Order, March 18, 1980

ORDER DENYING MOTION TO STAY APPEAL

Respondent American Home Products (AHP) has filed a motion requesting the Commission to stay AHP's appeal pending its consolidation with other cases involving advertising claims for analgesic products,¹ or, in the alternative, to stay consideration of a motion filed by Sterling Drug Inc. in one of the other cases (Dkt. 8919).² For the reasons stated below, AHP's motion for a stay is denied.

One of the grounds asserted by AHP as a basis for its motion is that Commission consideration of Sterling's proposed consent order in Dkt. 8919 would "prejudge" AHP's appeal in this proceeding. AHP contends that this prejudgment would occur because the proposed consent order in Dkt. 8919 contains provisions applicable to Sterling's over-the-counter combination analgesics which are very similar to provisions contained in the order entered by the Administrative Law Judge against AHP in this proceeding. AHP's contention that Commission consideration or disposition of a proposed consent order in another, factually-related proceeding would somehow disqualify the Commission from deciding this appeal is without merit, and AHP has cited no precedent for it. A tribunal which in the context of a prior proceeding has passed on factual issues is not precluded from passing upon identical issues in a subsequent adjudication even when the two proceedings derive from the same set of facts. See, e.g., *Pangburn v. CAB*, 311 F.2d 349, 358 (1st Cir. 1962). Here, by contrast, Commission consideration of a proposed consent order in Docket No. 8919 requires no determination on the facts at issue in that proceeding; in addition, the two proceedings derive from distinct, albeit overlapping, sets of facts. Moreover, if AHP's position were correct, the Commission might be prevented from giving any consideration to the other pending analgesics cases, a result which would frustrate the exercise of the Commission's adjudicative function. Cf. *FTC v. Cement Institute*, 333 U.S. 683, 700-01 (1948).

AHP argues in addition that its appeal should be stayed pending its consolidation with any appeals from *Sterling Drug* and *Bristol-Myers* because of the "risk of unfairness inherent in deciding the pending analgesics cases on a piecemeal basis." This appears to be essentially

¹ *Sterling Drug, Inc.*, Dkt. 8919; *Bristol-Myers Co.*, Dkt. 8917.

² Sterling's motion sought to withdraw from adjudication all issues relating to Sterling's over-the-counter combination internal analgesics and to enter a cease and desist order applicable to these products.

the same concern about the potential competitive impact of an order against AHP which it has expressed before and which we have found to be premature. As we indicated in our orders dated November 3, 1978 denying an earlier motion to stay, and November 8, 1979 denying a motion for reopening of proceedings, the Commission is capable of considering, during the course of its review on appeal, the possible competitive impact of any order that it might enter if liability is found. We see no need to stay our consideration of this appeal.³

AHP's alternative request to stay consideration of the motion filed by Sterling Drug in Dkt. 8919 to withdraw certain issues from adjudication is not properly raised in this proceeding. If there were any reason to provide relief to AHP for the concerns it raises—and we have explained above that our view is to the contrary—such relief would be an order affecting the instant proceeding and not a separate proceeding to which AHP is not a party. Accordingly,

It is ordered, That the Motion of American Home Products Corporation for Stay of this Proceeding Pending Consolidation of all Three Pending Analgesics Cases on Appeal be, and the same hereby is, denied.

Commissioner Pitofsky did not participate.

³ If the Commission were to find liability, and if it were to enter an order with terms giving rise to a new question upon which respondent had no opportunity to argue earlier, AHP would have an opportunity to petition for reconsideration under Rule 3.55, 16 C.F.R. 3.55. Under that provision, the Commission may stay the effective date of its order.

IN THE MATTER OF
GENERAL FOODS CORPORATION

Docket 9085. Interlocutory Order, March 28, 1980

ORDER REMANDING MOTION FOR COURT ENFORCEMENT OF SUBPOENA

The administrative law judge has certified to the Commission a motion by General Foods for court enforcement of a subpoena *duces tecum* issued jointly to Jorge Wolney Atalla, as Chairman of the Board of Hills Bros. Coffee, Inc., and to Copersucar, c/o Jorge Wolney Atalla. The administrative law judge recommends that court enforcement be limited to Specifications 4 and 5, since he believes the other specifications are either duplicative or call for nonessential material. In brief, Specifications 4 and 5 request documents concerning the reasons for Copersucar's acquisition of Hills Bros. and the changes made in Hill Bros.' operations by Mr. Atalla or Copersucar.

Copersucar and Hills Bros. have raised two issues concerning the enforceability of this subpoena. First, Copersucar contends that, insofar as the subpoena seeks documents located in Brazil, it exceeds the Commission's statutory authority under Section 9 of the Federal Trade Commission Act, which provides that "the production of . . . documentary evidence may be required from any place in the United States." Copersucar's interpretation notwithstanding, Section 9 authorizes the Commission to subpoena documents located abroad, as well as documents located anywhere within the United States. *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, Misc. No. 78-0194 (D.D.C., filed Feb. 14, 1980); cf. *CAB v. Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951 (D.C. Cir. 1979); *FMC v. DeSmedt*, 336 F.2d 464 (2d Cir.), cert. denied, 385 U.S. 974 (1966). Thus, nothing in Section 9 would preclude enforcement of the subpoena.

Second, Hills Bros., acting on Mr. Atalla's behalf, has objected that the subpoena was not served in compliance with Rule 4.4(a)(1)(i) of the Commission's Rules of Practice, which require that service by mail of complaints, orders and other process under Section 5 be made to a person or corporation at his, her, or its residence or "principal office or place of business." The ALJ has read the rule to authorize service either at the principal office or *any* place of business of the party to be served. Hills Bros. contends that the word "principal" qualifies both "office" and "place of business," and that Hills Bros.' headquarters do not constitute Copersucar's or Mr. Atalla's principal place of business. We agree with Hills Bros.' interpretation of the rule.¹ This conclusion

¹ Rule 4.4(a)(1)(i) is derived from Section 5(f) of the Federal Trade Commission Act. While we have found no cases directly on point and the legislative history is silent, there are persuasive grounds to infer that our interpretation of

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