

Interlocutory Order

96 F.T.C.

IN THE MATTER OF
GENERAL FOODS CORPORATION

Docket 9085. Interlocutory Order, Aug. 19, 1980

ORDER ON FOLGER'S APPLICATION FOR REVIEW

The Folger Coffee Company and the Procter & Gamble Company (hereinafter collectively referred to as "Folger") have applied to the Commission for review of the Administrative Law Judge's order of April 9, 1980, denying continued *in camera* treatment of certain exhibits and related testimony. The law judge has certified Folger's appeal to the Commission pursuant to Rule 3.23(b). Complaint counsel have filed an answer opposing this appeal.

The exhibits in question consist primarily of Folger memoranda, written during the period of 1971 to mid-1976, concerning the company's then ongoing expansion into the markets of the eastern states. The law judge found that these documents analyzed the new markets, discussed the strengths and weaknesses of both Folger and its competitors, and described Folger's promotional activity, such as its use of advertising, discount coupons, and pricing allowances. These and other exhibits for which *in camera* treatment is sought also contain detailed information on Folger's sales, costs, revenues, and profits nationally and in specific areas. Finally, Folger asks that *in camera* status be given to testimony on these exhibits as well as to testimony on the results of a taste test comparing Maxwell House and Folger coffees and on the impact of a 1975 frost in Brazil.

The law judge concluded that the release of most of the exhibits and testimony covered by Folger's request would not be likely to result in "clearly defined, serious injury," as set forth in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1148 (1961). He therefore denied Folger's motion, subject to only two exceptions. First, he granted *in camera* treatment for testimony on Folger's northeast expansion, which he found would be of present value to competitors since Folger's expansion there is still underway. Second, he determined to retain *in camera* treatment of testimony and an excerpt from an exhibit (RX 1080) that disclosed Folger's profits on High Point coffee for the years 1976 through 1979. The High Point data were deemed particularly sensitive because the product is still being test marketed.

Folgers presents four arguments in support of its *in camera* request. First, in its motion before the law judge, Folger has contended that the information in the exhibits and testimony in question is secret and material to its business, and, taken as a whole, constitutes a "unique encyclopedia of marketing knowledge." Folger

insists that, regardless of their age, these materials would be valuable to competitors by affording them the benefits of Folger's experiences in entering new markets and by disclosing to them Folger's strategies for mounting or responding to competitive challenges. Second, in its application for review, the company states that the 1976-1979 profit data on High Point coffee appears in an exhibit containing similar data on Folger vacuum and flaked coffee, and argues that these recent data are equally sensitive and equally deserving of *in camera* protection. Third, Folger points out that it is not a party to this proceeding and asserts that it should not have to make the same kinds of showings for *in camera* treatment as parties are required to present. Fourth, in a memorandum supplementing its application for review,¹ the company contends that amendments to the Commission's statute made by the Federal Trade Commission Improvements Act of 1980, Pub. Law No. 96-252, prohibit the Commission from removing any of the materials at issue here from *in camera* status.

The last two arguments can be disposed of quickly. Concerning the effect of the amendatory legislation, we agree with Folger that Section 6(f) of the Federal Trade Commission Act now secures confidential treatment for a broader class of business information obtained by the Commission. However, we do not agree that anything in the Federal Trade Commission Improvements Act, or its legislative history, weakens the long-held position that Section 6(f) does not absolutely bar disclosure of business data as evidence in adjudicatory proceedings. See *H.P. Hood & Sons, Inc.* New Section 21(d)(2) of the FTC Act provides that "[a]ny disclosure of relevant and material information in adjudicative proceedings to which the Commission is a party shall be governed by the rules of the Commission for adjudicative proceedings . . . except that the rules of the Commission shall not be amended in a manner inconsistent with the purposes of this section." Discussing what ultimately was enacted as Section 21(d)(2), the Senate Report on S.1991 stated specifically that the Commission should maintain the procedures in Rules 1.18(b) and 3.45 for granting *in camera* treatment. Senate Report No. 96-500 at pp. 27-28 (1979). Rule 3.45 governs Folger's instant request, and provides that evidence may be held *in camera* only for good cause, citing *H.P. Hood & Sons, Inc.* as support. Thus, the recent amendments to the Federal Trade Commission Act only support the view that Section 6(f)'s confidentiality provisions do not prohibit disclosure of evidence in adjudications.

¹ Folger's request to file its supplementary memorandum of June 26, 1980, is hereby granted.

As to Folger's contention that third parties should be afforded more lenient standards for *in camera* treatment, we similarly note that such a rule would conflict with consistent Commission policy. While it is true that in *Crown Cork & Seal Co.*, 71 F.T.C. 1714 (1967), we suggested that the *in camera* request of an uninvolved bystander warranted special solicitude, we nevertheless applied the same standards as had been enunciated in *H.P. Hood & Sons, Inc.*, and denied *in camera* treatment. Furthermore, our decision in *Bristol-Myers Co.*, 90 F.T.C. 455 (1977), which elaborated on the *Hood* standards, also involved an *in camera* request from a non-respondent.

Folger's remaining two arguments present no new questions of law or policy, but simply raise the issue whether the law judge has properly applied the Commission's guidelines for *in camera* status to the facts before him. In our order of March 10, 1980, concerning General Food's own *in camera* motion, we stated that the bases for *in camera* treatment were secrecy and materiality, and advised law judges to consider the six factors listed in the Restatement of Torts citing our *Bristol-Myers* opinion. We also stated that "administrative law judges have broad discretion in determining what information should be placed *in camera* and we do not ordinarily disturb their determinations except on the basis of showing of abuse," Order of March 10, 1980 at p.3. We emphasize that point here. If the law judge has properly interpreted the Commission's *in camera* standards and applied them clearly to the facts in issue, we will be reluctant to question his conclusions. At the interlocutory stage, we are neither familiar with the broad contours of the case below or the specifics of the information in question, and we are therefore ill-equipped to second-guess an ALJ's factual findings on *in camera* motions.

In the present case, we are not prepared to overturn the law judge's decision to deny *in camera* treatment to most of the exhibits and testimony covered by Folger's motion. The law judge carefully reviewed Folger's arguments concerning each of the six factors cited in our *Bristol-Myers* order, and concluded that the information in question may at one time have provided competitors with advantages had it been released. However, the ALJ also noted that the documents were three and a half to nine years old, and dealt with marketing campaigns that have already been put into effect. He concluded, therefore, that Folger's competitors have already obtained, through experience, much of the business information contained in the exhibits and testimony and that their release now would not be likely to result in serious injury. While there may be some merit in Folger's argument that discussions of its marketing

and promotional strategies might continue to have significance to competitors, we have previously placed movants for *in camera* treatment under a greater burden when the information is old. *See, e.g., General Foods*, Docket No. 9085, Order of March 10, 1980; *Crown Cork & Seal Co., supra*. That is the case here, and we do not believe we are in a position to question the law judge's specific finding that the information at issue has not lost its competitive sensitivity.

In contrast, the law judge has not clearly articulated his reason for distinguishing between recent profit data on High Point coffee and profit and sales data on Folger's vacuum and flaked coffees. Presumably, he may have concluded that the release of such data on the vacuum and flaked brands would not seriously injure Folger since they already have established market positions. However, as we note in our companion order on General Foods' *in camera* motion, the law judge may have construed the meaning of the "clearly defined, serious injury standard" too narrowly, so as to require a specific demonstration of how the release of concededly secret and material information would be likely to injure the competitor that provided it.² Given this possibility, coupled with the apparent sensitivity of recent coffee profit data, we believe that the law judge should provide a more explicit analysis of why the release of such data is not likely to prove harmful. Accordingly, we remand on the narrow issue of whether the remainder of RX 1080 and any testimony thereon should be held *in camera*.³ We reiterate, however, that once the law judge reconsiders this issue and articulates his position under the appropriate standards,⁴ his determination will be upheld absent an abuse of discretion. Accordingly,

It is ordered, That Folger's application is denied except to the extent that it seeks *in camera* treatment for the entirety of RX 1080 and testimony thereon, in which respect it is remanded for reconsideration and additional findings.

Commissioner Bailey did not participate.

² Order Denying in Part and Remanding in Part General Foods' Application for Review at p. 2.

³ As we stated in our order of March 10, particularly difficult questions may be resolved by granting *in camera* status to information until the close of trial, at which point the law judge may review the motion, or until appeal to the Commission which may take up the motion when it has greater familiarity with the case and access to the information itself.

⁴ Recent sales and profit data generally suggest themselves as being both secret and material to the firm concerned. Specific inquiries relevant to the secrecy and materiality of such data include whether substantially equivalent information is available from other sources and, if not, whether the products concerned are so well established in the market that disclosures about them would not prove injurious. In addition, as we state in our order today concerning General Foods' own *in camera* request, "when certain information is found to be materially valuable and secret to a firm's competitive business activities, the Administrative Law Judge may infer, without a specific showing of how a competitor would use it, that the loss of information would adversely affect the possessor's commercial position." Order Denying in Part and Remanding in Part General Foods' Application for Review at p. 2.

Complaint

96 F.T.C.

IN THE MATTER OF
MIDLAND-ROSS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF
THE CLAYTON ACT

Docket C-3035. Complaint, Aug. 21, 1980—Decision, Aug. 21, 1980

This consent order prohibits, among other things, a Cleveland, Ohio corporation from having as a director any individual who also serves as a director of a competitive company whose revenues exceed the lesser of ten million dollars, or one percent of the company's total annual revenues.

Appearances

For the Commission: *Dennis F. Johnson and Thomas J. Keary.*

For the respondent: *Robert H. Rawson, Jr., Jones, Day, Reavis & Pogue, Cleveland, Ohio.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated the provisions of Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and that a proceeding by it in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

COUNT 1

PARAGRAPH 1. Gould Inc. ("Gould") is a corporation organized under the laws of the State of Delaware, with its principal place of business located at 10 Gould Center, Rolling Meadows, Illinois. Gould has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 2. Respondent Midland-Ross Corporation ("Midland-Ross") is a corporation organized under the laws of the State of Ohio, with its principal place of business located at 20600 Chagrin Boulevard, Cleveland, Ohio. Midland-Ross has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 3. Respondent Claude M. Blair is an individual, with his principal place of business located at National City Corporation, Post Office Box 5756, Cleveland, Ohio.

PAR. 4. Gould conducts its business, as described herein, in various