

Interlocutory Order

96 F.T.C.

IN THE MATTER OF

GROLIER, INCORPORATED, ET AL.

*Docket 8879. Interlocutory Order, Sept. 12, 1980*ORDER REOPENING PROCEEDING AND DIRECTING SUBMISSION OF
FURTHER INFORMATION

On January 24, 1980, the United States Court of Appeals for the Ninth Circuit remanded this case to the Commission.¹ *Grolier, Inc. v. FTC*, 615 F.2d 1215, 1222 (9th Cir. 1980). The purpose of the remand was to allow us to reconsider our denial of discovery "and in light of the results of that reconsideration, the disqualification motion" filed by Grolier. 615 F.2d at 1222. The Court did not require us to grant discovery but instead authorized the use of affidavits to show "the existence and extent of ALJ von Brand's involvement with the Grolier case while he served as attorney-advisor." *Id.* Under the procedure established by the Court, Grolier then has the burden of offering evidence to contradict these sworn statements or show any deficiency in them before it will be permitted to subpoena agency records. *Id.*

The Court mandated this course of action to us because it believed that our order denying discovery (87 F.T.C. 179, 181 (1976)) was an improper "flat refusal" (615 F.2d at 1222) to disclose anything at all about Judge von Brand's participation in the Grolier case while he was an attorney-advisor to Commissioner MacIntyre.

Since we denied the combined disqualification and discovery motion, however, Grolier has gained access to most of the information sought in its discovery request by virtue of a Freedom of Information Act ("FOIA") request that repeated the discovery request *in haec verba*. Indeed, most of the documents sought and an index of the few documents withheld have been available to Grolier since before Judge von Brand issued his Initial Decision. We note that the record of the district court proceeding contains much information, in affidavit form, which may make the discovery request moot. *Grolier, Inc. v. FTC*, No. 76-1559 (D.D.C.), *appeal pending*, D.C. Cir. No. 79-2263. We invite the parties to address this issue in the filings required by this order.

Because our earlier view was that attorney-advisors do not perform investigative or prosecutive functions there was no need for us to determine which of the twenty documents Grolier appended to the disqualification motion actually reached the Commission or

¹ A petition for rehearing was denied but the opinion was amended on April 17, 1980.

whether they involved this "or a factually related case." See 5 U.S.C. 554(d). The need for this type of analysis is apparent in view of the Ninth Circuit's ruling. We believe the parties should address these questions in their submissions.²

A related concern is what effect, if any, Grolier's failure to use documents in its possession before the Initial Decision issued should have on its ability to augment the record now. Some courts have held that the failure of a party to use information in its possession (from whatever source) renders a belated disqualification challenge untimely. See, e.g., *Marquette Mfg. Co. v. FTC*, 147 F.2d 589, 592 (7th Cir. 1945), *aff'd.*, 333 U.S. 683 (1978); *Safeway Stores, Inc. v. FTC*, 336 F.2d 795, 802 (9th Cir. 1966), *cert. denied*, 386 U.S. 932 (1967). See also *Marcus v. Director, Office of Wkrs' Comp. Prog.*, 548 F.2d 1044, 1050-57 (D.C. Cir. 1976). We urge the parties to address this issue also.

To provide a complete record on review and to minimize delay Grolier is directed to supplement the record of this proceeding, within five days of the receipt of this order, with: (1) the complaint (and attachments) filed in its FOIA suit *Grolier, Inc. v. FTC*, C.A. No. 76-1559 (D.D.C.); (2) the affidavit and index of documents filed by the Commission in response thereto; (3) the Commission's sworn answer to Plaintiffs' Interrogatories to Defendants—Second Set; (4) the affidavit of Carol M. Thomas dated September 15, 1977; (5) all memoranda, orders and judgments of the District Court in No. 76-1559 (D.D.C.); and (6) the affidavit of Carol M. Thomas dated March 21, 1979.

Thereafter Grolier will be allowed 25 days to renew its motion to disqualify Judge von Brand. At that time we expect Grolier to present evidence on: (1) the question of timeliness; (2) Judge von Brand's involvement with *ex parte* matters; (3) the specific documents, and the portions thereof (and the date Grolier received them), which show Judge von Brand could have had access to "information received outside of the controlled adjudicative setting" (615 F.2d at

² The Attorney General's Manual on the Administrative Procedure Act (1947), characterized by the Court of Appeals (615 F.2d at 1219) as an authoritative guide to the APA states (p. 54, n.6):

The limitation of the prohibition against consultation to those who perform investigative or prosecuting functions "in that or a factually related case", should be construed literally. * * *

The phrase "factually related case" connotes a situation in which a party is faced with two different proceedings arising out of the same or a connected set of facts * * * [as distinguished from cases that] may form a pattern similar to those which [the staff person] had theretofore investigated or prosecuted.

See also *Cisternas-Estay v. INS*, 531 F.2d 155, 161 n.4 (3d Cir.) (Gibbons, J., dissenting), *cert. denied*, 429 U.S. 853 (1976).

1220); and (4) whether the information involves this or a factually related case.

We also direct complaint counsel to review the 28 documents withheld from Grolier in the FOIA suit and ascertain what connection, if any, they have to the facts of this case. The results of this review shall be set forth in an affidavit to be filed and served (by express mail) within 15 days of this order.

Within a like period we request that Judge von Brand execute an affidavit recording his efforts to ascertain the extent, if any, of his involvement with Grolier matters while he was an attorney-advisor. The Secretary shall expeditiously serve the affidavit on the parties.

Complaint counsel may respond to Grolier's renewed motion within 20 days of being served with it. At that time the Commission will determine if any further proceedings are warranted.

Commissioner Pitofsky did not participate.

IN THE MATTER OF
totes incorporated

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

Docket C-3040. Complaint, Sept. 12, 1980—Decision, Sept. 12, 1980

This consent order requires, among other things, a Loveland, Ohio manufacturer of umbrellas and related rainwear, to cease withholding cooperative advertising credits or allowances, or in any way limiting or restricting dealers from participating in any cooperative advertising program because of the resale price at which the dealer has advertised or sold a product or because the dealer has used price comparisons in the advertising and sale of a product.

Appearances

For the Commission: *Jeffrey A. Klurfeld.*

For the respondent: *William Baskett and Foston Jacobs, Cincinnati, Ohio.*

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 totes incorporated, 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 thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

For purposes of this complaint, the following definitions shall apply:

“Product” is defined as any item which is manufactured, offered for sale or sold by respondent.

“Dealer” is defined as any person, partnership, corporation or firm which is authorized by respondent to purchase any product.

“Resale Price” is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any retail price suggested or established by respondent, any customary resale price, or the retail price in effect at any dealer.

PARAGRAPH 1. Respondent totes incorporated 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 10078 East Kemper Road, Loveland, Ohio.