

Interlocutory Order

97 F.T.C.

IN THE MATTER OF

GROLIER, INCORPORATED

*Docket 8879. Interlocutory Order, March 10, 1981*ORDER GRANTING DISCOVERY IN PART; DENYING DISCOVERY IN PART
AND "CLARIFYING" SEPTEMBER 12, 1980 ORDER

On September 12, 1980, we issued an order reopening this proceeding to comply with the mandate of the Court of Appeals for the Ninth Circuit in *Grolier, Inc. v. FTC*, 615 F.2d 1215 (9th Cir. 1980). On November 6, 1980,¹ respondent Grolier, Incorporated ("Grolier"), filed motions for discovery and "clarification" of our Order. The memorandum ("Resp. Memo.") accompanying the motions argued that the Commission had issued an order that "contradicts" the mandate of the Ninth Circuit (Resp. Memo. 6) and sought to justify extensive discovery. On November 26, 1980, complaint counsel filed an answer ("Answer"), with accompanying affidavits, which contends that additional discovery is not necessary. Finally, on December 22, 1980, Grolier filed a motion for leave to file a reply memorandum and a request for additional discovery.

Upon review it is difficult to escape the conclusion that Grolier's motion for "clarification" is largely designed to delay this proceeding. The only "clarification" sought is whether the September 12 Order requires "Grolier to follow a procedure different from what the Ninth Circuit mandated." Resp. Memo. at 6.² The answer is that it does not. As noted above, the Ninth Circuit's remand was premised on the fact that it believed Grolier was improperly denied any knowledge of Judge von Brand's prior participation in this case. The Court of Appeals, however, was unaware that an FOIA request, identical to Grolier's original discovery motion, had yielded all but 28 documents prior to remand. Our Order (Order at 2) invited the parties to comment on whether the release of those documents rendered the original discovery motion moot. Grolier chose not to comment. We, therefore, hold that, with our action today, Grolier's original discovery request for documents has been granted in its entirety. We do not believe the Court of Appeals intended the

¹ By the terms of the Commission's order of September 12, 1980, Grolier was allowed to renew its motion to disqualify Judge von Brand if it desired, and required to present the Commission with specified evidence on questions relevant to the motion by October 23, 1980. On September 29, 1980, Grolier sought additional time purportedly to review the documents it had possessed for several years by virtue of a FOIA request, before responding to the Commission's order.

² In seeking additional time on September 29, 1980, Grolier did not allude to any uncertainty as to what the Commission had ordered it to do and suggested to the Commission only that the additional time it requested was necessary to examine the documents it had received years ago under the FOIA, so that it could point to specific facts that demonstrated Judge von Brand should be disqualified.

Commission to elevate form over substance and search the same documents repeatedly³ simply to provide them in formal response to Grolier's discovery motion. The documents Grolier has, and has had for some time,⁴ along with the documents we make available by this order and the affidavits of Judge von Brand and former Commissioner MacIntyre should "adequately disclose the existence or non-existence of ALJ von Brand's involvement in prior Grolier matters." *Grolier, Inc. v. FTC, supra*, 615 F.2d at 1222. Now, according to the Court of Appeals, "Grolier, who has the burden of proof on the disqualification issue, may rightfully be obligated *** to offer evidence contradicting the sworn statements of the [FTC] ***." *Id.*

In its motion of November 6, 1980, Grolier seeks discovery beyond that which the Ninth Circuit ordered the Commission to consider. The requested discovery includes three depositions and ten categories of documents. Complaint counsel's Answer argues that most of this requested discovery will not shed light on the question of whether Judge von Brand was involved with information related to Grolier "received outside of the controlled adjudicative setting." 615 F.2d at 1220.

Complaint counsel has examined the remaining twenty-eight documents involved in Grolier's original request and not currently available to Grolier and states that none of the documents indicate they were "written, received or reviewed" by Judge von Brand. Affidavit of Edward B. Craig, IV. Complaint counsel also points out that a review of the Index to Documents⁶ (Submission of Documents, Exhibit C) in the FOIA suit makes it clear that nothing in the withheld portions of the documents would reveal anything about Judge von Brand's involvement with Grolier matters while he was an attorney-advisor. For example, the segments excised from the six documents in category A are only staff recommendations or opinions which could not reveal Judge von Brand's involvement. The documents in category B (Commission circulations) could only reveal whether Commissioner MacIntyre circulated a matter. Similarly the documents in category C (assignment sheets) could only reveal that a

³ The Commission searched its files two times at Grolier's request in the FOIA suit. Submission of Documents in Response to the Commission's Order of September 12, 1980 ("Submission of Documents"), Exhibits B and E. In addition, it responded to lengthy interrogatories from Grolier as to the nature of the Commission's record keeping systems. Submission of Documents, Exhibit D.

⁴ Some of the documents were provided to Grolier as early as May 1976. As of June 1976, only 41 documents were being withheld and some of those were partially released. In March 1979, the Commission released all of its blue minutes to Grolier with minor deletions. Submission of Documents, Exhibits B and G.

⁵ The Court of Appeals also would have allowed Grolier "to point out the inadequacy and inconsistency, if any, in the sworn statements" before it could subpoena documents. 615 F.2d at 122. Since this order and the FOIA response make available all the documents originally requested, this point is moot.

⁶ The district court in the FOIA suit reviewed the documents *in camera* and found the documents were both accurately described in the Index and properly withheld. Submission of Documents, Exhibit F.

matter was assigned to Commissioner MacIntyre. Because the Ninth Circuit rejected Grolier's argument that Judge von Brand is chargeable with involvement in all matters before the Commission while an attorney-advisor, whatever Commissioner MacIntyre reviewed or did has little relevance to Judge von Brand's "actual involvement" with Grolier information. 615 F.2d at 1221. Moreover, Mr. MacIntyre has provided an affidavit in which he states that he divided work in his office between investigative matters and adjudicative matters and only assigned adjudicative matters to Judge von Brand. Answer, Exhibit A. Grolier also requests documents referred to in the blue minutes which the Commission has already released. But, Grolier already has four of these documents. Answer, p. 10. Two others involve requests by state attorneys general for access to information contained in the Grolier file and do not concern the merits of the investigation. Answer, p. 10 and Exhibit B. The final document referenced contains a typographical error in the blue minute and, in any event, was prepared after Judge von Brand ceased to serve as an attorney-advisor. The last category of documents (staff notes on conversations with Grolier personnel) would not have come to the attention of the Commission.

Although the arguments summarized above do strongly suggest that the 28 documents in question, by their nature, could not shed light upon ALJ von Brand's involvement with Grolier matters, and although the district court has ruled that the documents are properly withheld as privileged in the FOIA context, the Commission has determined, in the exercise of its discretion, to release these documents to Grolier.

Grolier's other discovery requests in the November 6, 1980, motion called for documents that do not exist or appear unnecessary, especially in view of Mr. MacIntyre's affidavit, and are denied.⁷ Grolier has also filed a "reply" in support of its discovery motion and requested yet a fourth deposition. A reply is not normally permitted under our Rules (16 C.F.R. 3.22(c)). While we will grant leave to file the reply we deny the request for additional discovery. Grolier argues that Mr. MacIntyre's affidavit is at variance with Judge von Brand's affidavit and our previous opinions. But Grolier is factually incorrect.⁸ More fundamentally, Grolier misconstrues the Ninth

⁷ For example, several categories of documents sought concern items in Mr. MacIntyre's personal files. But Mr. MacIntyre states he has no such files relating to Grolier. Answer, Exhibit A. Other categories of documents sought involve all Commission cases in the relevant period that concerned encyclopedia sales or door-to-door sales on the ground they may be related cases because the same issues may be involved. This request is too sweeping and goes beyond the crucial question we must answer on disqualification, i.e., the extent to which the challenged adjudicator (Judge von Brand) was actually involved in his former position "with the case he is deciding." 615 F.2d at 1221. See also *Kroger, Inc.*, Docket 9102, Order, June 5, 1980.

⁸ There simply is no inconsistency between former Chairman Engman's perception that an attorney-advisor

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Circuit's mandate to allow it endless discovery. The Ninth Circuit only required us to provide the documents Grolier requested if there were inconsistencies in the affidavits dealing with Judge von Brand's prior involvement. See note 5, *supra*. The Commission has now done this. Grolier has all the documents it originally requested; all the documents related to Grolier which came before the Commission while Judge von Brand served as an attorney advisor; the sworn statements of Judge von Brand and Commissioner MacIntyre that they cannot recall his involvement with, or knowledge of, Grolier matters while he was an attorney-advisor. This wealth of materials far exceeds that available in *R.A. Holman & Co. v. SEC*, 336 F.2d 446, 452-54 (2d Cir. 1966) (the case the Ninth Circuit relied upon in ordering us to consider further discovery). There the Court held that it was not improper to refuse to allow depositions of the individual allegedly disqualified and others, when the party seeking disqualification received a summary of the investigation and sworn statements that the individual did not have any "substantial knowledge of the facts in issue."

With the benefit of everything involving Grolier that was before the Commission during the period Judge von Brand served as an attorney advisor, Grolier must now present evidence of his "actual involvement" with the Grolier case and demonstrate with particularity, his involvement, with *ex parte* matters received outside the controlled adjudicative setting and relevant to facts in issue. (615 F.2d at 1220.) We expect Grolier to file a renewed disqualification motion "if it is appropriate" (Reply 1, n.1), conforming to our Order of September 12, 1980, no later than March 30, 1981.⁹

Therefore, it is ordered, That Grolier is granted leave to file its reply and Grolier's motion for discovery is granted insofar as it requests the twenty-eight documents withheld in the FOIA suit and denied in all other respects, and

It is further ordered, That complaint counsel, upon receipt of this

"has access to the whole of his Commissioner's business," our statement that there is a "public perception that an attorney-advisor has some *** knowledge of all matters received the Commissioner's office," and Mr. MacIntyre's sworn statement that he compartmentalized the functions his advisors performed. First, what is at issue here is not a question of potential access or knowledge, but Judge von Brand's "actual involvement" with Grolier facts. 615 F.2d at 1221. Second, we are uniquely aware that each Commissioner has different office policies. Finally, and most important the Ninth Circuit specifically rejected the applicability of our clearance cases to the disqualification context by observing that Grolier's approach would produce an "unnecessarily impractical approach." We do not see any inconsistency either in the fact that to the best of Mr. MacIntyre's recollection Judge von Brand "never saw or knew about" Grolier matters and Judge von Brand's statement that he could not recall such matters even though he could not "flatly rule out" the possibility.

⁹ In view of the fact that Grolier has had virtually all the documents originally requested since 1976, the fact that Grolier previously led the Commission to believe it was examining those documents to comply with the Commission's order, and the fact that there are only 28 new documents to examine, an extension of time will be granted only in the most extraordinary circumstances.

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order serve Grolier with unexcised copies of the twenty-eight documents withheld in the Grolier FOIA suit, and

It is further ordered, That Grolier, if it desires, file a renewed motion to disqualify Judge von Brand, addressing the issues specified in our Order of September 12, 1980, no later than March 30, 1981.

Commissioner Pitofsky did not participate.

Interlocutory Order

IN THE MATTER OF

BOISE CASCADE CORPORATION

Docket 9133. Interlocutory Order, March 12, 1981

Denial of motions to disqualify Commissioner and dismiss complaint.

ORDER

On January 5, 1981, respondent filed a motion seeking recusal and alternatively, disqualification, of Commissioner Paul Rand Dixon based upon his public statement on April 23, 1980, which elucidated his reason for voting for the issuance of the complaint in this proceeding. On October 24, 1980, respondent had previously sought dismissal of the complaint from Administrative Law Judge Parker on the same basis. Although Judge Parker denied respondent's motion for dismissal and refused to certify this issue to the full Commission, respondent now seeks dismissal as a remedy from the Commission based upon Commissioner Dixon's statement. Complaint counsel seeks to have the motion returned to respondent "without Commission action" because Judge Parker had previously refused to certify the issue for Commission disposition.* On January 30, 1981, Commissioner Dixon placed a statement on the record in which he declined to recuse himself and stated his belief that it would be appropriate for the Commission to address the issue. On February 26, 1981, respondent filed a document denominated "Answer of Respondent Boise Cascade Corporation to Statement of Commissioner Dixon in Response to Motion for Recusal." The Commission has determined that respondent's motion should be denied.

We see no reason to disqualify Commissioner Dixon, since we do not believe that any bias, prejudice or apparent unfairness has been demonstrated. *Cinderella Career & Finishing School, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962). Commissioner Dixon's statement, in context, was an official, on-the-record expression of his view that the statutory requirement that the Commission's complaint be based on "reason to believe" had been fulfilled. *Cf., FTC v. Standard Oil Co.*, 101 S.Ct. 488, 493-94, 496-97 n. 14 (1980); *FTC v. Cement Institute*, 333 U.S. 683, 700-03 (1948); *Duffield v. Charleston Area Medical Center*, 503 F.2d 512, 517-19 (4th Cir. 1974); *Pangburn v. CAB*, 311 F.2d 349, 356-58 (1st Cir. 1962). It is axiomatic that in determining

* The ALJ certified other claims presented in the motion to dismiss which will be treated in a separate order at a later date.