

IN THE MATTER OF
BEATRICE FOODS CO., ET AL.

Docket 9112. Interlocutory Order, Feb. 27, 1984

ORDER DENYING EXTENSION OF *IN CAMERA* TREATMENT

In response to the Commission's October 14, 1983 order to show cause for a two-year extension of *in camera* treatment for certain documents, respondent Tropicana Products, Inc. has withdrawn its motion for such an extension for all but one document, CX 413B.

CX 413B contains statistical information on Tropicana shipments of chilled and canned citrus products during the four-week period ending March 26, 1978. It is alleged that this information is not otherwise available and that the public disclosure of it would cause "clearly defined, serious injury," justifying the extension of *in camera* treatment under the standard for confidentiality articulated in *H.P. Hood and Sons, Inc.*, 58 F.T.C. 1184 (1961). Tropicana asserts that by knowing its total shipments for a one-month period almost six years ago, competitors could extrapolate from generally available A.C. Nielsen data on chain store distribution to determine the extent and strength of Tropicana's current non-chain distribution to specific geographic markets. It is alleged that non-chain distribution is a "recognized strength of Tropicana's distribution system" and that knowledge of it derived from this information could be utilized by competitors in sales and marketing strategies to Tropicana's competitive detriment. Tropicana Response to Show Cause Order at 5.

It is difficult to evaluate Tropicana's claim that the information in CX 413B is not otherwise available to the competition. We do know that it was submitted to the Florida Canner's Association, some of whose directors were executives of Tropicana's competitors, CX 414 A-B, yet it is unclear whether such individuals ever saw the information in CX 413B or would have been free to share it with their companies if they had. Regardless of this ambiguity, however, it remains the case that this information is now nearly six years old and, therefore, presumably not competitively sensitive unless Tropicana can make a "convincing showing that such data would provide significant insight into its strengths and weaknesses." *General Foods, Corporation*, 95 F.T.C. 352, 353-354 (1980).

We are not convinced it would. Accepting Tropicana's premise that its non-chain distribution is generally competitively sensitive information, we fail to see how competitors could use such old, limited data on total shipments in conjunction with Nielsen data to derive accu-

rate information on Tropicana's *current* non-chain shipments. For such analysis to be possible, the total amounts and geographic areas of Tropicana's distribution today would have to be basically unchanged from what they were six years ago. In support of this assumption, all that Tropicana contends is that there has been "limited relative growth" in the citrus industry, but even if that is true, it does not necessarily follow that Tropicana's volume and pattern of distribution have stayed the same. Absent better proof, we are not convinced that competitors of Tropicana could use the information in CX 413B in the manner suggested to any effective competitive advantage. Adding to our doubts about Tropicana's showing is its equally unsubstantiated claim that *in camera* treatment is needed for only two more years because "predicted . . . industry growth will result in ultimate minimization of the competitive sensitivity of the information." Tropicana Response at 7.

We thus find that Tropicana has not made the convincing showing of competitive injury required in seeking confidential treatment of old documents. In addition to claiming injury, Tropicana argues that there is no "countervailing consideration" in support of disclosing CX 413B to explain the Commission's decision since it was never cited in the opinion. *See General Foods Corp., supra*, 95 F.T.C. at 355. Before such countervailing considerations can even enter the analysis, however, competitive injury from disclosure must appear to be likely. This showing has not been made.

Therefore, *it is ordered* that the motion for extended *in camera* treatment for CX 413B is hereby denied.

Commissioners Miller and Douglas voted in the negative.

IN THE MATTER OF
GENERAL MOTORS CORPORATION

Docket 9145. Interlocutory Order, March 7, 1984

ORDER

By letter of November 1, 1983, Chairman Florio of the House Subcommittee on Commerce, Transportation, and Tourism of the Committee on Energy and Commerce requested access to certain materials in the so-called "GM Defects" case, D. 9145. [102 F.T.C. 1741 (1983)] Generally, the Commission takes the position that it has no authority to withhold information that is responsive to an official request of a congressional committee or subcommittee acting within its jurisdiction. *See* 15 U.S.C. 57b-2(b)(3)(C), 57b-2(d)(1)(A); 5 U.S.C. 552(c). *See also, e.g., Ashland Oil Co. v. FTC*, 409 F.Supp. 297 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976).

The materials responsive to Chairman Florio's request have been subject to a protective order that was entered by the administrative law judge in December 1980. That protective order limits access to the documents to Commission employees involved in the conduct of the proceeding and ostensibly precludes the Commission from authorizing their transmittal to Congress. Although an ALJ's order that purports to preclude the Commission from complying with an official congressional request for access is of doubtful validity, the Commission concluded that notice of its intention to disclose was appropriate and, on November 23, 1983, it issued an order that General Motors Corporation ("GM") show cause why the ALJ's order should not be modified to conform to the confidentiality provisions of the FTC Act. GM filed a response to that order on December 22, 1983.

General Motor's Response ("Res.") makes three arguments in opposition to the proposed modification. In addition, it requests access to the internal FTC staff memoranda responsive to Chairman Florio's request, return of the documents it submitted as well as of all copies made by staff, and permission to make an *in camera*, oral presentation to the Commission.

A. *GM's Arguments in Opposition and Disposition*

1. Modification After GM's Production in Reliance is Unfair

GM first argues that it is "unfair" for the Commission to "rewrite" its obligations after the company has provided documents in reliance on the order. It points out that "[t]he preamble to the Order straightforwardly declares that it has been 'stipulated and agreed to' by coun-