

ORIGINAL



**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: Jon Leibowitz, Chairman
J. Thomas Rosch
Edith Ramirez
Julie Brill

_____)	
In the Matter of)	
)	
GRACO INC.)	
a corporation,)	
)	Docket No. 9350
ILLINOIS TOOL WORKS INC.)	
a corporation,)	PUBLIC
)	
and)	
)	
ILLINOIS FINISHING LLC,)	
a limited liability company.)	
_____)	

**DEFENDANT GRACO INC.'S MEMORANDUM OF LAW
IN RESPONSE TO COMPLAINT COUNSEL'S MOTION TO PLACE THE
UNREDACTED COMPLAINT ON THE PUBLIC RECORD**

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I. INTRODUCTION

There is absolutely no reason to publicly disclose Graco's confidential information which Complaint Counsel placed in the unredacted complaint. Such a release would cause Graco serious injury, with no countervailing public interest served. The full, unredacted complaint has served to put the Court and the parties on notice of the allegations, and the redacted version has adequately informed the public of Complaint Counsel's allegations.

The unredacted complaint includes quotations and summaries extracted by Complaint Counsel from confidential company documents. These excerpts concern matters of business strategy and market analysis that are routinely protected from disclosure by federal courts and federal agencies. These documents were produced to the FTC under a claim of confidentiality and have not been previously made public. Furthermore, the issue of whether such confidential information can be disclosed to the public is currently fully briefed and pending before the United States District Court for the District of Columbia ("District Court"). In submitting the present motion to the Court prior to the District Court's decision, Complaint Counsel seeks to have two bites at the apple. Respondents respectfully request that this Court refrain from deciding the motion before it, pending the District Court's ruling.

Should this Court proceed to rule on the issue, Graco requests that the unredacted complaint not be made public. The release of Graco's confidential information has the potential to severely prejudice the company. First, the information redacted in the sealed complaint includes highly confidential communications between Graco's CEO and its Board of Directors regarding business strategy, as well as closely guarded strategic business plans. Complaint Counsel does not dispute that the redacted information reflects and includes Graco's strategic planning at this highest level of management. Second, the information has been selectively and misleadingly included in the complaint in a manner calculated to cause readers to make unfair

inferences about the implications of these documents. The misuse of these confidential documents threatens to harm Graco's business reputation and good will.

II. FACTUAL BACKGROUND

The redacted portions of the public complaint include the following confidential information from Graco:

- Communications by Graco's CEO to its Board of Directors discussing the proposed acquisition and assessment of the industry [Sealed Complaint, ¶ 1];
- An unverified internal Graco estimation of its market position [*Id.*, ¶ 2];
- Excerpts of a Graco strategic planning presentation prepared for its Board of Directors [*Id.*, ¶ 6];
- An estimate of combined Graco and ITW sales that relies on confidential Graco sales data [*Id.*, ¶ 12];
- Confidential statements made by Graco's CEO to the FTC in the course of the FTC's investigation of the proposed transaction [*Id.*, ¶ 18]; and
- Graco's CEO's confidential discussion of its strategic position [*Id.*, ¶¶ 19 and 23].

The redactions in the public version of the complaint were narrowly tailored and removed a mere 21 lines from the sealed version. (In addition to these redactions of Graco information, five additional redactions of non-Graco sourced information were made in the public complaint.)

Graco provided the above information to the FTC during its pre-complaint investigation. In producing all of these materials, Graco invoked and relied on the FTC's statutory and regulatory provisions governing the confidentiality of competitively sensitive business information. *See* 15 U.S.C. § 57b-2 and the FTC Rules of Practice §§ 4.10 – .11 (1987).

On the same day it filed its administrative complaint before this Court, the FTC filed a nearly identical complaint in the District Court, seeking a temporary restraining order and preliminary injunction to prevent Respondents from consummating the proposed acquisition by Graco of the finishing business of ITW. The redactions made in the public versions of the administrative complaint and the District Court complaint are identical.

III. ARGUMENT

Procedurally, a decision on Complaint Counsel's motion should await the outcome of the FTC's similar motion to the District Court. Substantively, if addressed, the motion should be denied.

A. The Same Issue Is Currently Pending Before The District Court, And This Court Should Refrain From Deciding Complaint Counsel's Motion

The Commission has frequently recognized that a stay of administrative proceedings is appropriate pending the decision of collateral issues in the district court in order to avoid duplicative and potentially inconsistent rulings. *See, e.g., In re Dynamic Health of Florida, LLC*, Dkt. No. 9317, 2005 FTC LEXIS 6, *4-*6 (Jan. 12, 2005) (issuing a stay in the proceeding pending decision of federal criminal court proceeding because the same issues were being addressed, the stay was limited, and sentencing was imminent); *In re California Dental Ass'n*, Dkt. No. 9259, 1996 FTC LEXIS 277, *8-*12 (May 22, 1996) (issuing a stay in the proceedings pending decision of federal court in order to "avoid the potential cost and confusion" from parallel determinations).

The parties have already fully briefed to the District Court the issue of whether the confidential information cited in the complaint can be made public. A decision on the protection of the very same confidential information at issue here is imminent. To avoid the potential for

disparate rulings, this Court should exercise its discretion and refrain from ruling on Complaint Counsel's motion pending the District Court's ruling.

B. The Disclosure Of Confidential Information Contained In The Unredacted Complaint Is Prohibited By The Protective Order

Graco's cooperation with the FTC's mammoth information requests was, in part, predicated on the FTC's continued assurances that Graco's confidential business information would not be disclosed to its competitors. In its response to the second request, Graco invoked and relied on the FTC's statutory and regulatory provisions governing the confidentiality of competitively sensitive business information. *See* 15 U.S.C. § 57b-2 and the FTC Rules of Practice §§ 4.10 – .11 (1987). These investigation stage confidentiality protections do not vanish upon the initiation of a judicial proceeding. In fact, Commission Rule 3.31(d) expressly requires that the parties enter into a protective order “[i]n order to protect the parties and third parties against improper use and disclosure of confidential information” 16 C.F.R. § 3.31(d). The issuance of a protective order ensures that the confidential materials disclosed during the FTC's pre-complaint investigation are not summarily disclosed to the public upon the FTC's decision to issue a complaint before the Commission. The present case is no exception—as required by Rule 3.31(d), this Court issued a protective order on December 16, 2011. *See* Protective Order Governing Discovery Material (“Protective Order”).

The Protective Order governing discovery materials in this proceeding expressly prohibits the disclosure of the confidential materials redacted from the public complaint. The Order extends to “any document or portion thereof submitted by a respondent or third party during a Federal Trade Commission investigation” Protective Order, ¶ 2. The information redacted from the public complaint was not and is not publicly available, but was disclosed by Graco to the FTC during its investigation. Any “confidential material,” which the Protective

Order defines to include “competitively sensitive information” (*Id.*, ¶ 1), “shall be treated as confidential material” (*Id.*, ¶ 2) that shall not be disclosed publicly. *Id.*, ¶ 7. If “confidential material is contained in any pleading, motion, exhibit, or other paper . . . such papers shall be filed *in camera*.” *Id.*, ¶ 8 (italics in original). In compliance with the Protective Order, Complaint Counsel made redactions of specific confidential materials from the public complaint, allowing the unsealed complaint to be disclosed only to the Administrative Law Judge, counsel, and other relevant court personnel. Complaint Counsel now requests that this Court circumvent its own Order and put these confidential materials into the public record. Complaint Counsel’s request should be denied.

C. Even Absent The Protective Order, Graco’s Confidential Business Communications Are Entitled To *In Camera* Review

Notwithstanding the fact that the Protective Order conclusively renders the redacted information confidential, Complaint Counsel feels that public policy nonetheless instructs the Court to place the unredacted complaint in the public record. To support this argument Complaint Counsel cites to Commission precedent and rules addressing *in camera* review of documents. The record is clear, however, that Graco is not seeking to remove complete documents from the public record under *in camera* review. Instead, Graco merely seeks to maintain the limited redactions already present in the public complaint, consistent with the Protective Order in place.

Regardless, Complaint Counsel has over-simplified the standard for *in camera* review of documents. Commission Rule § 3.45 states that the determination of whether sensitive information is entitled to *in camera* review “shall be based on the standard articulated in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961); *see also Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977), which established a three-part test that was modified by *General Foods Corp.*, 95 F.T.C.

352, 355 (1980).” Complaint Counsel wishes to collapse the multi-part analysis contained in these three precedents into the blanket statement that there is a strong presumption in favor of open access.

While *H.P. Hood* provides that a strong presumption in favor of open access should be the starting point for the analysis of requests for *in camera* review, it recognizes that the full balancing of interests is more nuanced:

[T]he Commission should protect the confidential records of persons or corporations involved in proceedings before it insofar as such protection is practicable. Is this duty in conflict with our duty to hold public hearings? We think not. The answer lies somewhere between the Scylla of indiscriminate "*in camera*" rulings and the Charybdis of complete and unnecessary disclosure.

H.P. Hood, 58 F.T.C. 1184, 1961 FTC LEXIS 368, at *9 (Mar. 14, 1961). The Commission continues on to hold that public disclosure of “trade secrets” should be presumptively prohibited, while an applicant seeking *in camera* review of business information must make a “good cause” showing that disclosure would cause serious injury. Rule § 3.45 then cites *Bristol-Myers* because it is here that the Commission clarified how an applicant demonstrates serious injury:

[W]e believe demonstrating serious injury requires the applicant to show [1] that the documents are secret, [2] that they are material to the applicant's business and that [3] public disclosure will plausibly discourage the future production of such information.

Bristol Meyers Co., 90 F.T.C. 455, 1977 FTC LEXIS 25, at *4–*5 (Nov. 11, 1977). Finally, *General Foods Corp* modifies *Bristol Meyers Co.* by removing the third prong.

Thus, Complaint Counsel states only half the test when asserting that Graco must demonstrate that it will suffer “a clearly defined, serious injury” as the result of disclosure. Rather, to demonstrate serious injury, such that public disclosure is not warranted, Graco must show that (1) the documents are secret and (2) that they are material to the Graco’s business. It

is abundantly clear that the information redacted from the public complaint meets both prongs of this test.

1. The Redacted Portions Of The Public Complaint Represent Secret Business Information

The public has not had access to Graco's competitively sensitive information. Indeed, Graco has not allowed this information to be circulated beyond its Board of Directors and the highest levels of management. In order that Graco's CEO may speak openly and frankly to its Board of Directors, Graco takes care to ensure the complete privacy of all CEO-Board communications. In fact, the CEO's presentations to the Board are not circulated at all and only presented once to the Board alone. The testimony given by Graco's CEO covered subjects that are not discussed beyond Graco's highest levels of management. Furthermore, this testimony was proffered in express reliance on the FTC's rules granting confidentiality to the subject documents and testimony.

Courts recognize that documents and communications of this nature are highly confidential and regularly allow them to be submitted under seal. *See, e.g., United States v. Hubbard*, 650 F.2d 293, 318 (D.C. Cir. 1980) (reversing the district court's order placing church business documents on the record); *Tavourelareas v. Washington Post Co.*, 724 F.2d 1010, 1022 (D.C. Cir. 1984) (holding that the district court erred in lifting the seal on confidential business information), *vacated in part on other grounds*, 763 F.2d 1472 (D.C. Cir. 1985) (en banc); *LEAP Systems, Inc. v. MoneyTrax, Inc.*, 638 F.3d 216 (3rd Cir. 2011) (holding that privacy interests are significant where "secretive business information" was disclosed under assurances of confidentiality); *Awuah v. Coverall North America, Inc.*, 585 F.3d 479, 482 (1st Cir. 2009) (citing the district court's rejecting of a motion to unseal in light of confidential business practices information). Similarly, courts have acknowledged the significant privacy interests

corporations have in closely guarded business information. *See, e.g., Vesta Corset Co. v. Carmen Founds., Inc.*, No. 97 CIV. 5139 (WHP), 1999 WL 13257 at *2 (S.D.N.Y. Jan. 13, 1999) (granting a protective order limiting the disclosure of confidential pricing and marketing information); *ACT, Inc. v. Sylvan Learning Sys.*, No. CIV. A. 99-63, 1999 WL 305300 at *2 (E.D. Pa. May 14, 1999) (denying motion to compel on the basis that disclosure of the company's proprietary market analysis could cause it serious commercial harm).

Complaint Counsel's quotations derive from materials submitted confidentially by Graco as part of Hart-Scott-Rodino ("HSR") antitrust review process. Such material is protected from public disclosure during pre-complaint discovery. *See* 15 U.S.C. § 18a(h); *Lieberman v. Federal Trade Commission*, 771 F.2d 32, 38 (2nd Cir. 1985) ("Congress wanted premerger information kept confidential."). At every step of the way, Graco sought confidential protection for the documents and information it disclosed. As the Commission has noted, "the extent of measures taken by the part to guard the secrecy of the information" is germane to a consideration of the protection which should be afforded to the information. *See Bristol-Myers Co.*, 90 F.T.C. at *5. None of the confidential statements and information at issue is public today. Complaint Counsel should not be allowed to make it public at the expense of Graco.

2. The Redacted Portions Of The Public Complaint Are Material To Graco's Business

The redacted information is material to Graco's business such that it would face harm to both its legal and business interests if the information is disclosure publicly. First, Graco faces harm to its business interests by publication of the redacted information. For example, the strategic planning information redacted from the complaint is not known by Graco's competitors, some of whom have submitted declarations to the FTC in support of its investigation. Graco's internal business communications should not be laid bare to its competitors. Moreover, Graco

has no ability to claw back the information once it has been made public, and release of the information should not be allowed to establish a precedent in this proceeding that Graco's confidential business documents are not entitled to protection. This is exactly the type of information that should never be disseminated to competitors, who are sure to read any public version of the Complaint. *See F.T.C. v. Exxon Corporation*, 636 F.2d 1336, 1350 (D.C. Cir. 1980) ("It cannot be disputed that the most critical of all protective measures is that which prevents the disclosure of competitively sensitive information [to competitors]."); *Bradburn Parent/Teacher Store, Inc. v. 3M*, No. Civ. A. 02-7676, 2004 WL 1146665 at *1-3 (E.D. Pa. May 19, 2004) (accord).

Second, a "[s]ensational disclosure" that will cause a party prejudice in later proceedings goes to the appropriateness of maintaining a seal on it. *Hubbard*, 650 F.2d at 320-21. Complaint Counsel has taken snippets of statements made by Graco's CEO out of context in order to bolster its allegations. Given the lack of any identified public need for the redacted information, there is no reason to allow Complaint Counsel to impugn Graco publicly with allegations before either this Court or a District Court decides the merits of the case.

Third, Graco cooperated in the FTC's regulatory investigation in reliance on FTC rules protecting confidentiality. For example, Complaint Counsel now seeks to unseal testimony of Graco's CEO given with the understanding that such testimony would be protected from disclosure. Graco will suffer prejudice from denial of the confidentiality protections upon which it has relied in cooperating with the FTC's investigation.

Finally, Complaint Counsel's motion is an attempt to establish an unfair and tactical advantage. Complaint Counsel has cherry picked excerpts from confidential business materials to support publicly its allegations. Graco cannot respond, either in kind or by attempting to place

the selected excerpts in context, while simultaneously protecting the confidentiality of these materials. Complaint Counsel should not be allowed to use Graco's confidential materials for public relations gain.

IV. CONCLUSION

For the foregoing reasons, Graco respectfully requests that Complaint Counsel's motion to unseal the unredacted complaint be denied.

Dated: January 23, 2012

Respectfully submitted,

s/ Richard A. Duncan

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CERTIFICATE OF SERVICE

I certify that on January 23, 2012, I have caused the foregoing Defendant Graco Inc.'s Memorandum of Law in Response to Complaint Counsel's Motion to Unseal the Unredacted Complaint to be served by email upon Phillip Broyles (pbroyles@ftc.gov), Peter Richman (prichman@ftc.gov), Marc Schneider (mschneider@ftc.gov), and Amanda Hamilton (ahamilton1@ftc.gov) of the Federal Trade Commission; and upon J. Robert Robertson (robby.robertson@hoganlovells.com), Logan Breed (Logan.Breed@hoganlovells.com), and Meghan Edwards-Ford (Meghan.Edwards-Ford@hoganlovells.com) of Hogan Lovells US LLP, counsel for Illinois Tool Works Inc. and Illinois Tool Works Finishing LLC.

I also emailed a copy of the foregoing to secretary@ftc.gov and caused a copy to be filed via ECF.

s/ Matthew M. Martin

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